Petition

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

81-1765

No. 81-

IN THE

Supreme Court of the United States

October Term, 1981

TOWNSHIP OF DOYLESTOWN,

Petitioner

v.

AD WORLD, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED.

This Court, despite the number of occasions on which it has dealt with the problem of door-to-door distribution of written materials, has never suggested that depositing or scattering advertising material on doorsteps, porches, driveways, and lawns of private residences, or strapping or tying such material to doorhandles, garage doors, or mailboxes in a residential neighborhood, without the owners' consent, enjoys the same protection as in-person canvassing, solicitation and distribution. Nor has the Court ever held that the mere deposit of material may not be regulated as to manner and place, where it has been shown affirmatively to signal the homeowners' absence and thus to invite burglaries. On the contrary, the Court has said in many decisions that door-to-door distribution of written matter remains subject to content-neutral regulation as to time, place, and manner, to further substantial governmental purposes.

This Court has so said while recognizing that the First Amendment confers broad protection for in-person, door-to-door canvassing and distribution of written materials. Local ordinances unduly abridging this right have been invalidated by the Court. *Lovell v. Griffin*, 303 U. S. 444 (1938); *Schneider v. Irvington*, 308 U. S. 147 (1939) (ordinance prohibiting distribution without a permit); *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (ordinance prohibiting house-to-house solicitation without approval of local authorities); *Martin v. Struthers*, 319 U. S. 141 (1943) (ordinance prohibiting persons distributing handbills, circulars and other advertisements from ringing door bell, or sounding door knocker); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943) (ordinance requiring payment of license tax); *Hynes v. Mayor of Oradell*, 425 U. S. 610

(1976) (ordinance requiring advance notice to local police and identification of canvassers); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980) (requirement that 75% of receipts be used for charitable purpose).

Unlike those cases, the present case squarely presents the questions:

1. Whether the First Amendment renders a community powerless to prevent residential burglaries, invited by the deposit and visible accumulation of unrequested advertising material, through enactment of an ordinance prohibiting advertisers from distributing their material house-to-house by "placing such material at the residence, on the property or on the residential mail box of the person owning or occupying the residence, without the consent of the occupant."

2. Whether such an ordinance is unconstitutional as applied to a local "shopper", or "advertiser", consisting predominantly of commercial advertising and containing only a token amount of other information.

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OPINIONS BELOW.

The Opinion of the Court of Appeals, from which review is sought, is unreported and is set out in the Appendix hereto at A1.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 510 F. Supp. 851 (E. D. Pa. 1981), and is printed in the Appendix hereto at A20.

JURISDICTION.

The Court of Appeals entered its judgment in the appeal on February 5, 1982, reversing the district court and holding Ordinance 117 unconstitutional. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).[1]

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1. Petitioner believes that this Court would also have jurisdiction of this case as an appeal, under 28 U. S. C. § 1254(2), "by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution. . . ." A municipal ordinance is a "State statute" for purposes of § 1254(2). *New Orleans v. Dukes*, 427 U. S. 297, 301 (1976).

However, the Court's express pretermission of "the question as to the continuing vitality of the 'finality' requirement in the context of § 1254(2)" motivates petitioner to invoke the certiorari jurisdiction of the Court under 28 U. S. C. § 1254(1). *New Orleans v. Dukes, supra*, 427 U. S. at 301-29. *Compare: Doran v. Salem Inn, Inc.*, 422 U. S. 922, 927 (1975) and *Chicago v. Atkinson, T. & S. F. R. Co.*, 357 U. S. 77, 82-83 (1958), with *Slaker v. O'Connor*, 278 U. S. 188 (1929); and *South Carolina Electric & Gas Co. v. Flemming*, 351 U. S. 901 (1956).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Ordinance 117 of the Township of Doylestown, held unconstitutional below by the Court of Appeals for the Third Circuit, provides:

> AN ORDINANCE OF THE TOWNSHIP OF DOYLESTOWN, BUCKS COUNTY, PENNSYLVANIA, REGULATING THE DISTRIBUTION OF ADVERTISING MATERIALS AT RESIDENCES WITHIN THE TOWNSHIP.
>
> WHEREAS, certain persons, firms or corporations have recently begun the distribution of advertising materials to Doylestown Township residents by placing or hanging the advertising material on mail boxes or posts or by depositing the said material upon other portions of private property without the request or consent of the owners or occupiers of the property, and
>
> WHEREAS, in the judgment of the Board of Supervisors this manner of distribution of advertising materials is unsightly, constitutes an invasion of privacy, and unless picked up by the property owner within a reasonable time, the presence of such advertising material would be a clear indication that the residence was unoccupied and thus increase the possibility of vandalism and/or burglary.
>
> BE IT ORDAINED, by the Board of Supervisors of the Township of Doylestown, Bucks County, Pennsylvania and it is hereby Ordained and Enacted by authority of same:
>
> 1. That it shall be unlawful for any person, firm or corporation to distribute advertising material at a residence within Doylestown Township (other than at the home of the person, firm or corporation distributing the same) by placing such material at the

residence, on the property or on the residential mail box of the person owning or occupying the residence, unless the person, firm or corporation distributing such advertising material does so based upon the affirmative request or consent of the person occupying the residence. The foregoing provision shall not apply to the distribution of advertising material through the United States mail service.

2. That any violation of this Ordinance shall be considered a summary offense and upon conviction before a district justice, the violator shall be subject to a fine not exceeding $300.00. Each unlawful distribution to a residence shall be considered as a separate offense.

3. That this ordinance shall be added to the Code of Ordinances of the Township of Doylestown, Bucks County, Pennsylvania, and shall be effective five (5) days after its legal enactment.

The First Amendment to the Constitution of the United States provides, in pertinent part

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE.

A. Background.

The Township of Doylestown ("Township") is a small residential community of Bucks County, Pennsylvania, located north of Philadelphia. Like many such communities, the Township has recently experienced a sharp increase in property crimes. Reported residential burglaries doubled from 32 in 1979 to 64 in 1980. At least one-third of these crimes were committed while the residents were away. (App. 44).[2]

Township police have found a direct connection between burglaries and attempted burglaries and visible signs that the home is unoccupied. (App. 44). In particular, the Doylestown Township police have discovered that accumulations of advertising material on front doorsteps or in driveways attract burglars. During interrogation, burglars apprehended by the Township police have admitted that they select a house to burglarize by looking for certain tell-tale signs that the occupant is not at home. An accumulation of papers visible from the street is one of the signs that burglars watch for. According to a lieutenant of the Township police department (App. 44):

> Lt. White: * * * Some of the perpetrators said they looked at several signs that let them know that there is no one there, and one of the signs is advertising in the driveway of the home.

This *modus operandi* is confirmed by accumulations of advertising material found by police in front of homes that have been burglarized. (App. 45).

2. References to the Joint Appendix in the court below are denoted by "App." followed by the page of the Joint Appendix. References to the Appendix to this petition are denoted by "A—" followed by the page number.

Prowlers apprehended by police have admitted that they believed no one was home at the residences where they were arrested. (App. 45-46). In some of these incidents, police also determined that the accumulation of advertising material was one of the signals that had invited criminal activity. (App. 46).

In an effort to prevent burglaries, the Township Police conduct approximately 100 house checks each week, protecting the homes of residents who have advised the local police that they are going to be out of town. (App. 45). House checks for vacationing citizens turn up advertising material left on the doorsteps, on the mailboxes, or hanging on garage doors visible to passersby. (App. 45-46). While residents are able to stop their mail delivery before going on vacation or leaving town, they are not similarly in a position to prevent the accumulation of unsolicited advertising material thrown on their property in their absence. Township police have been forced to devote scarce manpower to the removal of such material from driveways and porches to the back of the home in the resident's absence in an effort to eliminate what would otherwise be a clear signal for burglars. (App. 45-46).

Respondent, Ad World, Inc. ("Ad World"), located in nearby Levittown, Pennsylvania, prints and distributes advertising "shoppers" in nine geographic areas of which Doylestown Township is one. Ad World began distribution in Doylestown Township of a weekly circular entitled "Piggy Back" in October 1980. (App. 19). "Piggy Back" principally contains retail advertisements for clothing, wall hangings, pottery, food, appliances, furniture, clocks, lawn and garden equipment, automotive supplies and the like. Advertising "inserts" supplied to Ad World by its advertisers are frequently folded with the pages of "Piggy Back" and distributed as part of the paper. (App. 18). Inserts often account for 12-14 pages of the material dis-

tributed. Occasional announcements of community events also appear in its pages. (App. 14-16).

"Piggy Back" has no paying subscribers. (App. 14, 25). The costs of its distribution are covered entirely by Ad World's advertising revenues. (App. 25). Advertising revenues depend directly on the number of copies distributed. (App. 26). The fewer the copies deposited, the less Ad World is paid by its advertisers. The "Piggy Back" is distributed in Doylestown Township by 45 carriers whose compensation is, in turn, based on the number of copies which they deposit at homes along their routes within the Township. (App. 26). The fewer the copies deposited, the less the carrier is paid by Ad World. Thus, there are powerful economic incentives for Ad World and its carriers to throw copies on lawns, doorsteps, and driveways, whether or not residents wish to receive the publication.

Beginning in October, 1980, and continuing thereafter, Ad World's carriers deposited about 3,200 copies throughout the Township each week. Carriers distributed the "Piggy Back" from house-to-house throughout the Township by throwing unsolicited copies on doorsteps, on porches, in driveways, and by affixing copies to front doorhandles, to garage doorhandles, to the posts of mailboxes, and by fastening or tying copies to mailbox hooks and posts with nylon straps, in places visible to passersby. (App. 20). Ad World's carriers did not bother to knock on the door and hand a copy to the occupant (App. 21), and did not bother to obtain the consent of Township residents to leave copies at their homes. (App. 33).

Township residents objected to this practice, and demanded that Ad World cease unsolicited distribution in this manner. Their complaints and requests were admittedly ignored, either by Ad World, or its carriers, or both. (App. 24, 37, 38, 41, 46). Township police

received a barrage of complaints from citizens whose requests Ad World had failed or refused to honor.

Several house burglaries occurred in the Township in late 1980. Circumstances pointed clearly to the fact that accumulations of advertising material had signalled the culprits that the homeowners were away. Three burglaries occurred in one residential development where the garage doors faced the street. In each one, entry had been made through the garage. The "Piggyback" was found hanging by a strap from the garage door. (App. 39-40).

Another resident testified that he emerged from his home one morning to discover a plastic bag of advertising material hanging from his garage door. Looking up and down his street, he noticed "many plastic bags hanging on garage doors" in his neighborhood. Within a single 3-4 week period, burglars broke into three homes in the neighborhood. (App. 50).

Police interrogations confirmed the connection between burglaries and accumulation of advertising material. (App. 44).

B. Ordinance 117.

On February 3, 1981, Doylestown Township enacted Ordinance 117 which makes it unlawful for a person, firm or corporation to distribute advertising material *"at a residence"* within Doylestown Township "by placing such material at the residence, on the property or on the residential mail box of the person owning or occupying the residence, unless the person, firm or corporation distributing such advertising material does so based upon the affirmative request of the person occupying the residence." By its terms Ordinance 117 does not apply to "the distribution of advertising material through the United States

mail service." Violation of the ordinance is made a summary offense punishable by a fine of not more than $300.

The ordinance is narrowly drawn. It requires no advance identification or registration by door-to-door canvassers. It erects no permit requirement delegating to local authorities discretion to screen publications or individuals engaged to deliver them. It does not prohibit entry onto residential premises to deliver advertising material. It does not prohibit those distributing advertising material from knocking on the doors or ringing doorbells. It does not prohibit door-to-door distribution of advertising material in person. It does not even prohibit the deposit of the material, if the consent of the occupant is obtained. It does not give the township absolute control over distribution; it leaves the choice up to the individual resident. It is limited in its application to residential properties and does not apply to commercial premises in the Township.

The ordinance thus allows many alternative means of distributing such material.

Significantly, an identical Pennsylvania ordinance had been previously upheld by the Supreme Court of Pennsylvania in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978). Ordinance 117 was modelled on the ordinance upheld in the *Sterlace* decision.

C. Proceedings Below.

Ad World began this suit on February 10, 1981, by filing a complaint in the United States District Court for the Eastern District of Pennsylvania. The complaint invoked the jurisdiction of the district court under 28 U. S. C. § 1331 and sought an injunction against the enforcement of Ordinance 117 and damages alleged to be in excess of $10,000, together with attorneys' fees and costs of suit. The complaint challenged the constitutionality of Ordinance 117 as violative of the First Amendment to the

United States Constitution. On the same day, the district court entered a temporary restraining order against the Township's enforcement of Ordinance 117 against Ad World and scheduled a hearing on Ad World's application for further injunctive relief.

1. The Trial.

On February 19, 1981, the Honorable Charles R. Wiener of the United States District Court for the Eastern District of Pennsylvania held a hearing on plaintiff's application for a preliminary injunction, and consolidated the preliminary injunction hearing with the final hearing on the merits.

The district court heard the testimony of four witnesses: William A. Smith, the President of Ad World; Diane Hering, Doylestown Township Supervisor; Lieutenant Stephen White of the Doylestown Police Department; and Robert Larson, a resident of Doylestown Township.

On March 26, 1981, the district court filed a Memorandum Opinion and Order upholding the constitutionality of Ordinance 117 (App. 52). On the same day, the district court entered an Order denying Ad World's claims for damages, injunctive relief, attorneys' fees and costs, and entered judgment accordingly, in favor of the Township. (App. 63).

2. The Judgment of the District Court.

The district court viewed "Piggy Back" as "commercial speech" and separately considered the relevant factors under *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U. S. 557 (1980).

First, the Court found that Ad World's publication was entitled to the protection of the First Amendment.

Second, the district court concluded that the Township's interest in protecting its citizens from crime was also

"substantial," citing *Hynes v. Mayor and Council of Borough of Oradell*, 425 U. S. 610, 616-19 (1976) and *Martin v. City of Struthers*, 319 U. S. 141, 144 (1943).

Third, the district court specifically found that "the accumulation of advertising materials at a residence poses significant risks to the public, as it is a clear invitation to burglars and vandals to enter apparently unoccupied premises." The Court cited specific record evidence, quoted above, in support of this finding: "The testimony of Doylestown Police Lieutenant White amply supports the connection between unoccupied residences and increased burglaries and vandalism." The district court also relied upon the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Sterlace*, 481 Pa. 6, 12, 391 A. 2d 1066, 1069 (1978), upholding the constitutionality of an *identical* ordinance. The district court found that prohibiting the deposit, without consent, of advertising material tends to minimize the likelihood of accumulation and, therefore, minimize the risk that burglars, noticing these signs that the owners are away, will select them to burglarize. Thus, the district court concluded, Ordinance 117 "directly advances the stated governmental interest."

Fourth, the district court concluded that Ordinance 117 is no more extensive than necessary to serve the substantial governmental interest it promotes. The requirement of consent guarantees that the resident will know of the delivery and will thus be able either to collect the materials before they accumulate, or arrange to have others remove them in his absence. The district court found that a more limited regulation simply would not be effective.

Finally, the district court found that there were ample alternative means of distribution.

Ad World filed a timely notice of appeal on April 27, 1981.

3. The Majority Opinion of the Court of Appeals for the Third Circuit.

On February 5, 1982, a divided panel of the Court of Appeals for the Third Circuit (Circuit Judges Gibbons and Sloviter) held Ordinance 117 unconstitutional, on its face and as applied, as violative of the First and Fourteenth Amendments. The Court of Appeals reversed the judgment of the district court, remanded the case for the entry of a permanent injunction against enforcement of Ordinance 117, and remanded for further proceedings with respect to Ad World's damage claim against the Township. The Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey (sitting by designation), dissented from the panel decision and filed an opinion expressing the view that Ordinance 117 is a valid time, place and manner regulation.

The majority concluded that the "Piggy Back" was not "commercial speech" and was entitled to the "full protection of the first and fourteenth amendment." Ignoring both the Township's explicit showing, and Judge Wiener's finding, of a direct correlation between house burglaries and the accumulation of advertising material, the majority stated that Doylestown Township had "provided no evidence of a strong connection between accumulation of papers and the incidence of burglary." (A10).

Second, the panel held that the Township was obliged to adduce "evidence that accumulation is so widespread that, even assuming a positive correlation with crime, it suggests more than a hypothetical or speculative increase in burglary." (A10). In other words, the Court held that the Township had the burden to prove that the Township would have experienced an *increase in burglaries* in the absence of Ordinance 117.

Finally, the panel held that the Township had the burden of proving that "consented distribution leads to less accumulation than unconsented distribution." (A10).

The Township's failure to present less "speculative" proof of these facts was held by the panel majority to be determinative.

The majority also expressed the belief that less restrictive means were available but had not been attempted. The majority suggested, as an example, that the Township could punish homeowners for failing to remove advertising material deposited, without their consent, by others. (A11). The panel majority also suggested that "forms may be attached to the papers that can be returned by a homeowner not wanting to receive *Piggy Back*" and that "a municipal office may channel complaints against distributors." (A11).

The majority found dispositive this Court's decision in *Martin v. City of Struthers*, 319 U. S. 141 (1943) (invalidating a local ordinance prohibiting door-to-door distribution by knocking on the door or ringing the doorbell and handing the circular to the occupant). Although the fact pattern in *Martin v. City of Struthers* did not involve the deposit of material on the doorstep, or the risk of signalling burglars, the majority reasoned that "[i]f a solicitor or canvasser is thus protected by the first amendment in undertaking a door-to-door solicitation with its attendant potential for foul play, a publisher such as Ad World is *a fortiori* protected in having a paper delivered door to door and having it left on the front steps or on the mailbox of a home." (A11). The majority concluded that Ordinance 117 is "not sufficiently related to the state interest advanced to pass constitutional muster." (A12).

The panel opinion squarely contradicts the decision of the Pennsylvania Supreme Court in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1006 (1978), which upheld the constitutionality of an identical ordinance. Without discussing the reasoning of the Pennsylvania Supreme Court, the majority simply noted: "That opinion obviously

cannot bind us in our interpretation of the Federal Constitution." (A3).

4. The Dissent.

Dissenting, Judge Meanor noted the majority's "casual reference . . . without explication" to the Pennsylvania Supreme Court's *Sterlace* decision. While classifying "Piggy Back" as "a hybrid of both commercial and non-commercial speech," Judge Meanor concurred in the majority's view that it is "entitled to full first amendment protection." (A16). Reviewed under the most exacting standards, Judge Meanor concluded, Ordinance 117 "is constitutionally valid as a reasonable time, place and manner regulation."

Judge Meanor disagreed with the majority's reference to "undifferentiated fears" as the motivation for the ordinance, and found "Doylestown's interest in crime prevention . . . substantial." (A17). Moreover, Judge Meanor pointed to specific record evidence of the correlation between the occurrence of burglaries and indications that residences were unoccupied, quoting the testimony of Township police. Judge Meanor also gave weight to the statement by the Pennsylvania Supreme Court in the *Sterlace* decision that "there can be no question that an accumulation of advertising materials at the entry of a residence, whether at a door or a mailbox, poses significant risks in a residential area. Such an accumulation would be a clear invitation to burglars and vandals to enter apparently unoccupied premises." Judge Meanor found Ad World's evidence as to alleged non-existence of effective alternative means of distribution "disturbingly deficient" and pointed to the fact that after the temporary restraining order was dissolved, Ad World had, in fact, employed the United States mails to deliver "Piggy Back." In Judge Meanor's view, Ad World remained free to use

public forums to distribute Piggy Back; remained free under the ordinance to distribute by courier simply by having the courier knock on the door and hand the publication to the occupant; and even remained free under the ordinance to deposit the advertising simply by securing the consent of the homeowner. Judge Meanor concluded: "What is apparent is that, other than the conclusory statement of Smith [Ad World's president] with respect to the use of the U. S. Post Office, there is no evidence that alternatives are prohibitively expensive." (A18).

Judge Meanor thus found it "inescapable that alternative avenues of distribution are available" to Ad World. (A19).

REASONS FOR GRANTING THE WRIT.

I. The Court Should Grant Certiorari to Settle the Direct Conflict Between the Court of Appeals for the Third Circuit and the Supreme Court of Pennsylvania.

In the present case, the Court of Appeals for the Third Circuit has held unconstitutional a Pennsylvania township's ordinance that is identical to an ordinance whose constitutionality was specifically upheld by the Supreme Court of Pennsylvania in the recent case of *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978). The decisions of the highest court of Pennsylvania and of the court of appeals for the same circuit are thus in irreconcilable conflict. This direct conflict, on an important question of interpretation of the First Amendment, warrants the grant of the petition to review the decision of the Court of Appeals. *See, Memorial Hospital v. Maricopa County*, 415 U. S. 250, 253 (1974); *Lego v. Twomey*, 404 U. S. 477, 479 n. 1 (1972).

Judge Meanor, in his dissenting opinion in the Court of Appeals below, underscored the resulting problems of federalism and comity posed by the Third Circuit's decision:

> Less than four years ago, the Supreme Court of Pennsylvania had occasion to determine the constitutionality of an ordinance identical[1] to Doylestown Ordi-

1. Except for the insertion of the word "Doylestown" in Section 1 of Doylestown Ordinance No. 117 and the substitution of the word "justice" for "magistrate" in Section 2, Ordinance No. 117 is identical to McCandless Township Ordinance No. 662 which was reviewed by the Pennsylvania Supreme Court in Commonwealth v. Sterlace, 481 Pa. 6, 391 A. 2d 1066 (1978).

nance No. 117. The ordinance was upheld as constitutional. *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978). The majority of this court makes only casual reference to the *Sterlace* decision, without explication. I cannot so lightly disregard a decision of Pennsylvania's highest tribunal. Fundamental tenets of federalism and comity demand much more.

While the Court of Appeals majority was correct in observing that the Pennsylvania Supreme Court's "opinion obviously cannot bind [the Court of Appeals] in [its] interpretation of the Federal Constitution," neither the Supreme Court of Pennsylvania nor the lower courts of Pennsylvania are bound by the opinion below in deciding future cases involving identical Pennsylvania ordinances. *See, United States ex rel. Lawrence v. Woods*, 432 F. 2d 1072 (1970); *Owsley v. Peyton*, 352 F. 2d 804, 805 (4th Cir. 1965). *Breckline v. Metropolitan Life Ins. Co.*, 406 Pa. 573, 578, 178 A. 2d 748 (1962); *Commonwealth v. Rundle*, 203 Pa. Super. Ct. 419, 201 A. 2d 615 (1964); *Hangelias v. Dawson*, 158 Pa. Super. Ct. 370, 374, 45 A. 2d 392 (1946).

The problems posed by this conflict are not hypothetical. A survey of the ordinances of approximately one hundred Pennsylvania townships and boroughs alone, reveals that ordinances like Doylestown Township Ordinance 117 are quite common.[3]

3. Abington Code, § 108-1(E); Ashley Code, § 69-13(A); Carbondale Ordinances, § 42-11(a); Clearfield Borough Ordinances, § 31-1; Coal Code, § 89-3; Coatesville Code, § 84-2; Borough of Columbia, Ordinances, § 46-1; Borough of Curwensville, Ordinances, § 65-2; Borough of Darby, Ordinances, § 82-1; Borough of Eddystone, Ordinances, § 71-1; Edwardsville Code, § 82-2; Fountain Hill Code, § 35-1(29); Borough of Forty-Fort, Ordinances, § 32-1; Harvey's Lake Code, § 25-2; West Hazelton Code,

The Third Circuit's decision in this case has relegated the type of ordinance involved here to a constitutional limbo from which review by this Court now provides the only escape. This Court should grant the petition to resolve the conflict.

II. The Court Should Grant Certiorari to Settle a Disputed First Amendment Issue of Natonwide Importance Affecting Community Crime Prevention.

According to a recent survey[4] conducted by the National Association of Advertising Publishers, there are at least 700 free shoppers distributed throughout the nation on a weekly basis. Copies are currently distributed to more than 18,000,000 households nationwide. A total of 936,000,000 copies are distributed annually, accounting for the deposit of 3,000 tons of newsprint each year on the doorsteps of homes throughout the country. Shoppers currently account for 52 billion pages of printed matter per year.

At least 80% of this material is distributed by carrier and privately-owned distribution systems. The remaining

3. (Cont'd.)

§ 73-18; Homestead Code, § 63-13(A); Jenkintown Code, § 103.1 (E); Littletown Code, § 3-1; Mahonoy City Code, § 128-13(A); Montrose Code, § 70-18(A); Marion Heights Code, § 35-13(A); Milford Code, § 67-17(A); Millbourne Code, § 50-18(A); Norwood Code, § 61-8; Palmer Code, § 34-3(F); Pennsburg Code, § 57-3; Prospect Park Code, § 90-1; Radnor Code, § 83-2(G); Sharon Hill Code, § 86-4; Springdale Code, § 34-1; Steelton Code, § 71-2(G); Stroudsburg Code, § 46-2(H); Swoyersville Code, § 32-1; West Chester Code, § 64-3.

4. In the Court of Appeals, appellant Ad World, Inc. lodged with the court a copy of the 1981 "Special Advertisers Issue" of *Free*, a publication of the National Association of Advertising Publishers. The data set forth are drawn from this trade association publication submitted by appellant below.

20% of it is distributed by mail. The companies comprising this industry boast of "95-98% saturation" of the areas they serve. Geographically, their distribution blankets practically the entire United States, as reflected by membership statistics of the industry trade association:

East Coast	18%
Upper Midwest	45%
West Coast	4%
Southeast	19%
Plains States	14%

Within the advertising publishing industry, there is a rapidly increasing trend toward the inclusion of more product samples and "preprints" supplied by mass merchandising concerns such as Sears, Roebuck & Co., J. C. Penney Co., and other national advertisers that increasingly dominate advertising in this format. The business is highly profitable:

> "A newsless shopper has few costs except printing and delivery: Consultant Theodore Gunkel says an established pure shopper with stabilized competition can show 30% of revenues as pretax profits."
>
> "*Free*", Special Advertiser Issue, 1981, at 32.

Since this Court's decision in *Martin v. City of Struthers, supra,* ordinances of the type invalidated by the Court of Appeals in this case have become one of the only remaining means of dealing with the mounting problem of local crime aggravated by the distribution practices of this industry.

Constitutional challenges to these ordinances have divided the state Supreme Courts. Ordinances of the type

involved in this case have been upheld by the highest tribunals of Pennsylvania and New York. *See, Commonwealth v. Sterlace,* 481 Pa. 6, 381 A. 2d 1066 (1978); *People of New York v. Walkenhorst,* 55 Misc. 2d 935 (1968), *rev'd on other grounds,* 59 Misc. 2d 563 (1969); *People v. Bohnke,* 287 N. Y. 154, 38 N. E. 2d 478 (1941).

In sharp contrast, the Supreme Court of Tennessee has held the ordinance unconstitutional. *H. L. Messengers, Inc. v. City of Brentwood,* 577 S. W. 2d 444, 12 ALR 4th 835 (Tenn. 1979). The California Supreme Court has struck down a similar ordinance. While the constitutionality of this type of ordinance was upheld in *DiLorenzo v. Pacific Grove,* 260 Cal. App. 2d 68, 67 Cal. Rptr. 3 (1st Dist. 1968), the *DiLorenzo* case was later expressly overruled by the California Supreme Court in *Van Nuys Pub. Co. v. City of Thousand Oaks,* 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P. 2d 809 (1971), *cert. denied,* 405 U. S. 1042 (1972); *compare, National Delivery Systems, Inc. v. City of Inglewood,* 43 Cal. App. 3d 573, 117 Cal. Rptr. 791 (1974).

The lower federal courts have also wrestled with these issues. However, until the decision of the Third Circuit in this case, the ordinance had been uniformly upheld in the lower federal courts. *See, Ad Express, Inc. v. Kirvin,* 516 F. 2d 195 (2d Cir. 1975); *Sunday Mail, Inc. v. Christie,* 312 F. Supp. 677 (C. D. Cal. 1970); *Buxbom v. City of Riverside,* 29 F. Supp. 3 (S. D. Cal. 1939). The lower federal courts are now divided.

The division of authority, on an important issue of First Amendment interpretation, among the state Supreme Courts of Pennsylvania, New York, California, and Tennessee, and between the Third Circuit and the Second Circuit and other lower federal courts, warrants the grant of the petition to review the decision of the court of appeals below.

III. The Issues of Local Law Enforcement and of First Amendment Interpretation Involved Are Important and Should Be Resolved by the Court.

The decision of the Third Circuit, enjoining the enforcement of Ordinance 117, cripples local law enforcement officials in their efforts to prevent the burglaries and vandalism that are invited by national distribution practices of the advertising publishing industry. While advertising enjoys protection under the First Amendment, the police power of local communities and States to regulate the places and the manner in which such advertising may be distributed is equally well-established and no less important.

As Mr. Chief Justice Burger has recently stated, with reference to the analogous issues raised by regulation of door-to-door solicitation, "[t]he Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." *Hynes v. Mayor and Council of Oradell*, 425 U. S. 610, 616-17 (1976).

The Third Circuit's decision in this case is based upon an unwarranted extension of the holding in *Martin v. City of Struthers*, that upsets the balance between the First Amendment freedom to disseminate commercial and non-commercial speech from door-to-door on one hand, and, on the other, the powers of local communities across the land to protect local residents against crime by preventing the dissemination of unsolicited materials in a manner that signals burglars that the occupants are away and that the home is ripe for burglary.

CONCLUSION.

The lower court's decision in this case creates a head-on conflict between the highest State tribunal in Pennsylvania and the Court of Appeals for the Third Circuit on an important question concerning the interpretation and application of the First Amendment. The Supreme Courts of Pennsylvania, California, New York and Tennessee are divided on this important constitutional question. The issue divided the Court of Appeals, below.

Since this Court's decision in *Martin v. City of Struthers,* ordinances of the type in question in this case have become one of the most common and effective weapons in the arsenal of local law enforcement officials to combat the growing problem of residential burglaries.

For the reasons stated, the Court should grant the petition for a writ of certiorari and review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1497

AD WORLD, INC.,

Appellant

v.

TOWNSHIP OF DOYLESTOWN

(D.C. Civil No. 81-0518)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: November 19, 1981

Before: GIBBONS and SLOVITER, *Circuit Judges* and MEANOR, *District Judge* *

(Opinion Filed: February 5, 1982)

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* Hon. H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

Ad World, Inc., a publisher, appeals from a judgment in favor of defendant Doylestown Township in a suit for damages and declaratory and injunctive relief prohibiting enforcement of Doylestown Ordinance 117.[1] We conclude that the ordinance violates Ad World's first and fourteenth amendment rights, and we reverse.

Ad World, Inc. publishes *Piggy Back*, a 16 page tabloid which includes extensive advertising and a few pages of consumer and community information. Included in such community information are notices of community events and announcements. 510 F. Supp. at 853. *Piggy Back* provides coverage of communities and neighbor-

1. The district court opinion is reported. Ad World, Inc. v. Township of Doylestown, 510 F. Supp. 851 (E.D. Pa. 1981). The ordinance apparently was patterned upon an ordinance in another community which in Commonwealth v. Sterlace, 481 Pa. 6, 391 A.2d 1066 (1978), was held to be valid. That opinion obviously cannot bind us in our interpretation of the Federal Constitution.

hoods such as Doylestown Township by a free weekly distribution to every home in the area. Delivery is through local route carriers who attach the paper in a plastic bag to a mailbox hook or to a door knob or leave it on the premises. Ad World's policy is to stop delivery when a resident so requests, but it does not initially seek the householder's affirmative consent for delivery.

Piggy Back is a vehicle for advertisement by local merchants for the local market as well as a vehicle for news and announcements of local origin and interest. Publications such as *Piggy Back* are able, through an almost universal distribution to communities in suburban and rural areas, to make rates per household reached so attractive that local businesses can afford to advertise. Although the bulk of *Piggy Back's* content is advertising, appellant claims that the ratio of editorial and news contents to advertising is not significantly different from that of some metropolitan newspapers. The revenue from ads in *Piggy Back* allows Ad World to deliver its publication free of charge.

In October, 1980, plaintiff began distributing *Piggy Back* to homes in Doylestown Township, Bucks County, in Pennsylvania. On February 3, 1981, the Township enacted Ordinance 117:

> AN ORDINANCE OF THE TOWNSHIP OF DOYLESTOWN, BUCKS COUNTY, PENNSYLVANIA, REGULATING THE DISTRIBUTION OF ADVERTISING MATERIALS AT RESIDENCES WITHIN THE TOWNSHIP.
>
> WHEREAS, certain persons, firms or corporations have recently begun the distribution of advertising materials to Doylestown Township residents by placing or hanging the advertising material on mail boxes or posts or by depositing the said material upon

other portions of private property without the request or consent of the owners or occupiers of the property, and

WHEREAS, in the judgment of the Board of Supervisors this manner of distribution of advertising materials is unsightly, constitutes an invasion of privacy, and unless picked up by the property owner within a reasonable time, the presence of such advertising material would be a clear indication that the residence was unoccupied and thus increase the possibility of vandalism and/or burglary.

BE IT ORDAINED, by the Board of Supervisors of the Township of Doylestown, Bucks County, Pennsylvania and it is hereby Ordained and Enacted by authority of same:

1. That it shall be unlawful for any person, firm or corporation to distribute advertising material at a residence within Doylestown Township (other than at the home of the person, firm or corporation distributing the same) by placing such material at the residence, on the property or on the residential mail box of the person owning or occupying the residence, unless the person, firm or corporation distributing such advertising material does so based upon the affirmative request or consent of the person occupying the residence. The foregoing provision shall not apply to the distribution of advertising materials through the United States mail service.

2. That any violation of this Ordinance shall be considered a summary offense and upon conviction before a district justice, the violator shall be subject to a fine not exceeding $300.00. Each unlawful distribution to a residence shall be considered as a separate offense.

> 3. That this ordinance shall be added to the Code of Ordinances of the Township of Doylestown, Bucks County, Pennsylvania, and shall be effective five (5) days after its legal enactment.

Faced with an ordinance making its method of distribution illegal, Ad World on February 10, 1981 filed a complaint for an injunction preventing the Township from enforcing the Ordinance and for a declaration that it unconstitutionally infringed the right to free speech and press guaranteed by the first and fourteenth amendments. The complaint also seeks damages.

The District Court held Ordinance 117 to be a restriction on commercial speech and *Piggy Back* to be commercial speech. The court then considered whether the ordinance, as applied to plaintiff's publication, would pass the constitutional test for restrictions on commercial speech announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).[2] First the court examined the Township's interest, which was posited to be the protection of the public from burglary.[3] It concluded that the accumulation of advertising materials at residences provided a significant risk to the public, in the form of a signal to burglars that the premises were unoccupied. The regulation was thus directly related to the Township's public safety interest. Lastly, the court determined that Ordinance 117 was no more extensive than necessary to reach the desired result.

---

2. The district court properly rejected defendant's contention, repeated to us, that federal courts should abstain from this case. New Jersey-Philadelphia Presbytery of the Bible Presbyterians v. New Jersey State Bd. of Higher Ed., No. 80-1253, slip op. at 31-33 (3d Cir. Apr. 14, 1981).

3. No justification in terms of "unsightliness" and "invasion of privacy" was offered by the Township in the district court or here.

It therefore upheld Ordinance 117, refused to issue an injunction, and dismissed the complaint.[4]

Ad World contends that *Piggy Back* is noncommercial speech, and that, even if it were commercial speech, the distribution is protected by the first and fourteenth amendments which Ordinance 117 contravenes.[5] Since the first contention is well taken, we need not reach the second.[6]

The district court based its conclusion that *Piggy Back* must be treated as commercial speech on its finding that only a few pages out of 16 in *Piggy Back* were nonadvertising. 510 F. Supp. at 853. We conclude, however, that *Piggy Back* must be considered noncommercial speech. *Piggy Back* performs locally functions that larger metropolitan or regional newspapers undertake: spreading information generally, and providing a medium for advertising. Like such newspapers, it carries news and

4. To avoid prosecution, Ad World has been using the U.S. mails to distribute its paper.

5. Plaintiff also argues that Ordinance 117 is vague and overbroad. We do not reach these claims since we find Ordinance 117 to be unconstitutional as applied.

6. Commercial speech has certain features that allow greater regulation than noncommercial speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770. This difference in treatment pertains, however, to the nature of the commercial speech at issue. *Id.* at 771 n.24. Advertisements may be regulated to insure their truthfulness and to prevent harm to the public, *see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387-89 (1973), but that exhausts the difference between these advertisements and noncommercial speech. Ordinance 117, not being focused on the truthfulness of or the harm due to the advertisements, affects *Piggy Back* to the same extent and subjects the ordinance to the same constitutional limitations as if it were affecting pure noncommercial speech. *See generally Central Hudson, supra*, 447 U.S. at 564; *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

editorials as well as advertising, in a ratio which appears to be not significantly different from some established metropolitan newspapers. *Piggy Back* appears to be accepted as a newspaper in the Doylestown community, since only 50 out of 3000 households have requested that it not be delivered.

The fact that a publication carries advertisements or that it is for profit does not render its speech commercial for first amendment purposes. *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964). There is no evidence that the editorial content is added as a mere sham to convert a pure advertising leaflet into noncommercial speech. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942). The line between commercial and noncommercial speech for first amendment purposes cannot be drawn by some magic ratio of editorial to advertising content. The important question is whether the publication as a whole relates solely to the economic interest of the speaker and its audience. *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 561 (1980). Even if a publication such as *Piggy Back* had contained only advertisements, it might be possible to view the publication as qualitatively different from an advertising leaflet put forth by an individual merchant to tout only its own products, because the publication would create a forum in which advertisers compete for the consumers' attention. In view, however, of the conceded fact that each issue of *Piggy Back* contains noncommercial material deserving of full first amendment protection, we need not reach the extent of protection to which it would be entitled in the absence of such material. The Supreme Court has confined the category of "commercial speech" to cases involving "purely commercial advertising." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), *see Central Hudson*, 447 U.S. at 561.

Piggy Back is thus entitled to the full protection of the first and fourteenth amendments. That being so, Ad World has the right to distribute its publication. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Lovell v. Griffin*, 303 U.S. 444, 452; *Ex parte Jackson*, 96 U.S. 727, 723 (1877). The first amendment is not absolute; some regulation by the state is permissible. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Analyzing the appropriateness of the regulation requires examination of the governmental interest sought to be advanced. Those interests must be substantial. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Schneider v. State*, 308 U.S. 147, 161 (1939). The touchstone in first amendment cases is, moreover, precision of regulation. *NAACP v. Button*, 371 U.S. 415, 438 (1963), and we must therefore determine whether the means adopted by the Township are in fact closely tailored to the desired goal. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

The Township urges that Ordinance 117 is meant to prevent or to reduce burglary and vandalism. In days of increased crime, a community may be legitimately interested in methods of reducing if not halting crime.[7] Though we are not ordinarily wont to interfere in the exercise of the police power of a state government, or to question the wisdom and effectiveness of its police methods, in matters impinging on the first amendment we may not permit undifferentiated fears to excuse the

7. The number of burglaries in Doylestown increased from 32 to 64 over the 1979-80 period. There is no evidence that the increase occurred in the period following distribution of *Piggy Back*, and no evidence on the *modus operandi* of the burglars.

suppression of first amendment rights. *Cf. Tinkers v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

The Township wishes to stop the door to door delivery of plaintiff's *Piggy Back* because the paper is left visible to passers-by and because possible accumulation may tip off burglars that a given home is unoccupied. It has provided no evidence of a strong connection between accumulation of papers and the incidence of burglary. In fact, the Township has undercut its burglary rationale by restricting the regulation to advertising materials. This leaves exempt the delivery of political pamphlets, of religious proselytizing materials or of established newspapers or magazines delivered on subscription. Yet these publications could lead to similar accumulation and the same attendant risks. Doylestown fails to explain the difference in treatment. There is, moreover, no evidence that accumulation is so widespread that, even assuming a positive correlation with crime, it suggests more than a hypothetical or speculative increase in burglary. Finally, there is no evidence that consented distribution leads to less accumulation than unconsented distribution. Yet Ordinance 117 allows delivery if a publisher obtains the consent of each householder beforehand.

Plaintiff has used the time honored method of door to door distributions to deliver *Piggy Back*. Fear of vandalism is not a new assertion in justifying regulation of speech rights. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court examined a regulation that, as a means, *inter alia*, of preventing burglaries, forbade door to door solicitation and distribution of leaflets.[8] *Id.* at 144.

8. The city ordinance in that case stated:

> It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the

The City of Struthers argued that potential burglars, posing as canvassers or solicitors, could approach and examine a house in preparation of a later break-in. The Court decided that the regulation was invalid despite the substantiality of the city's interest. "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Id.* at 146-47. If a solicitor or canvasser is thus protected by the first amendment in undertaking a door to door solicitation with its attendant potential for foul play, a publisher such as Ad World is *a fortiori* protected in having a paper delivered door to door and having it left on the front steps or on the mailbox of a home. The *Martin* Court decided that there were less restrictive alternatives for reaching the state goal: the city could enforce its tresspass laws against burglars or a homeowner could put up a "no solicitation" sign which would be strictly enforced. Doylestown has not shown why similar solutions would not suffice. Other possibilities come to mind: forms may be attached to the papers that can be returned by a homeowner not wanting to receive *Piggy Back;* a municipal office may channel complaints against distributors; a requirement may be imposed that homeowners take steps to prevent accumulation in their absence. Putting the onus on the homeowner to cure the burglary problem may be appropriate. The Supreme Court has tenaciously protected the right of a speaker to reach a potential listener and get

NOTE — *(Continued)*

> door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.

Martin v. City of Struthers, 319 U.S. at 142.

the listener's attention. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). It does not seem onerous to impose on the potential listener some of the costs of this important freedom. *Cf. Cohen v. California*, 403 U.S. 15, 21 (1971) (better for viewer subjected to offensive insignia to avert eyes than for state to regulate badge-wearer); *Schneider v. State*, 308 U.S. 147, 162 (1939) (cannot prevent distribution of leaflets even if this creates the inconvenience for a community of cleaning litter). The Township and the dissent are completely silent on why some method of solving the paper accumulation problem less intrusive on the rights of the press than Ordinance 117 would not be equally effective. It merely reiterates that the regulation is minimal. That is not enough. *See Schad v. Borough of Mt. Ephraim*, — U.S. —, 49 U.S.L.W. 4597 (1981).

Ordinance 117 is not sufficiently related to the state interest advanced to pass constitutional muster. That conclusion is not changed by viewing the ordinance, as Doylestown would have us view it, as a non-content based reasonable time, place and manner regulation. We agree only that the regulation is not content based. A time, place, and manner regulation must be precisely drawn, however, and Ordinance 117 is not. *Schad, supra*, 49 U.S.L.W. at 4601; *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972). In any event, an essential characteristic of any acceptable place, time and manner regulation is that it leave adequate alternative methods of communication. *See Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1975). In the face of plaintiff's unrebutted evidence that alternatives to courier delivery are in terms both of time and of money prohibitively expensive, Doylestown has made no such showing.

The judgment appealed from will be reversed and the case remanded for the entry of an injunction against en-

forcement of Ordinance 117, and for further proceedings with respect to Ad World's damage claim consistent with this opinion.

MEANOR, *District Judge*, dissenting.

Once again the trumpet of free speech has been sounded. Most unfortunately, the blare has muted the cries of those with equally precious constitutional rights. For the following reasons, I am compelled to dissent.

Less than four years ago, the Supreme Court of Pennsylvania had occasion to determine the constitutionality of an ordinance identical [1] to Doylestown Ordinance No. 117. The ordinance was upheld as constitutional. *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A.2d 1066 (1978). The majority of this court makes only casual reference to the *Sterlace* decision, without explication. I cannot so lightly disregard a decision of Pennsylvania's highest tribunal. Fundamental tenets of federalism and comity demand much more. At the very least, this court is bound by the construction given to a state statute by the state courts. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971); *Albertson v. Millard*, 345 U.S. 242, 244 (1953). In our federal system, the state courts are regarded as the principal expositors of state law. *Moore v. Sims*, 442 U.S. 415, 429 (1979). Indeed, the state court's interpretation of an ordinance is "as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953). In *Moore v. Sims, supra*, Justice Rehnquist observed:

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1. Except for the insertion of the word "Doylestown" in Section 1 of Doylestown Ordinance No. 117 and the substitution of the word "justice" for "magistrate" in Section 2, Ordinance No. 117 is identical to McCandless Township Ordinance No. 662 which was reviewed by the Pennsylvania Supreme Court in Commonwealth v. Sterlace, 481 Pa. 6, 391 A.2d 1066 (1978).

> Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.

442 U.S. at 429, 430.

Essentially, Ordinance No. 117 prohibits the distribution of advertising material by placing such material at the residence, on the property or on the residential mailbox unless the affirmative request or consent of the occupant has been obtained. According to the testimony of William Andrew Smith, President of Ad World, Inc., the publication *Piggy Back* has been distributed by attaching it to the post of a mailbox by means of a nylon strap, by placing it on the porch or on the front steps, or by placing it on the garage doors or on the door knobs of premises in Doylestown.[2] Diane Herring, Doylestown Township Supervisor, testified that complaints were received by the Township Office to the effect that *Piggy Back* was "being thrown over the roads and the lawns."[3] Ad World apparently seeks to employ the same method of distribution in which it engaged prior to the enactment of Ordinance No. 117. To this end, Ad World challenges the constitutionality of the ordinance, primarily on first amendment grounds.

It has long been held that the right of freedom of speech and press embraces the right to distribute literature as well as the right to receive it. *Martin v. Struthers*, 319 U.S. 141, 143 (1942). However, first amendment rights have never been regarded as absolutes. In *Breard v. Alexandria*, 341 U.S. 622, 642 (1951), it was stated:

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2. Transcript of Temporary Restraining Order hearing, February 19, 1981, at 4, 10 (hereinafter "Transcript").

3. Transcript at 27.

> Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.

See also Heffron v. International Society for Krishna Consciousness, Inc., 49 U.S.L.W. 4762, 4764 (June 22, 1981). The *Martin v. Struthers* Court recognized that "the peace, good order and comfort of the community may imperatively require regulation of the time, place and manner of distribution." 319 U.S. at 143.

The type of analysis to be employed in determining the constitutionality of the ordinance depends upon whether the publication is classified as commercial or noncommercial speech. The district court concluded that *Piggy Back* was commercial speech and, consequently, engaged in the four-step analysis [4] for commercial speech cases enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). I concur with the majority that Ad World's publication cannot be classified as purely commercial speech, i.e., "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. Although *Piggy Back* is comprised predominately of commercial advertisements, it also contains certain items of community interest. Actually, Ad World's publication is a hybrid of both commercial and noncommercial speech. Neverthe-

4. For commercial speech to be afforded first amendment protection, it must concern lawful activity and not be misleading, and the asserted governmental interest in regulation must be substantial. If so, it must be determined whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980).

less, it is entitled to full first amendment protection as it does not relate *solely* to the economic interests of the speaker and its audience.

I am convinced that Ordinance No. 117 is constitutionally valid as a reasonable place and manner regulation. *Accord, Commonwealth v. Sterlace, supra.* The United States Supreme Court has upheld "time, place and manner" regulations, provided that they are justified without reference to the content of the speech, that they serve a significant governmental interest and that they leave open ample alternative channels for communication of the information. *Heffron v. International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. at 4764, *citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The majority concedes that the ordinance is not content based. *Accord, Commonwealth v. Sterlace, supra.* The *Sterlace* court construed the ordinance as applicable to all advertising, both commercial and noncommercial. Here, as in *Sterlace*, the preamble to the ordinance indicates that the concern was with the place and manner of distribution rather than with the content of any speech.

The primary justification proffered by Doylestown for the enactment of Ordinance No. 117 is that the accumulation of advertising material on private property would be a clear indication that the residence was unoccupied. Thus, the possibility of burglary and/or vandalism was thought to be increased. Additionally, the Township was concerned with the invasion of privacy and the unsightliness of such materials when deposited on private property.[5]

5. The majority concludes that no justification in terms of unsightliness and invasion of privacy was offered by the Township in the district court or here. But the preamble to the ordinance, which was apparently part of the record, plainly recites such justifications for the enactment of the ordinance. Furthermore, Doyles-

A municipality's interest in protecting its citizens from crime and undue annoyance is well recognized. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616 (1976); *Martin v. Struthers, supra*, 319 U.S. at 144. Doylestown's interest in crime prevention certainly is substantial. Surprisingly, the majority characterizes the Township's concern as an "undifferentiated fear," [6] and finds no evidence of a strong connection between the accumulation of advertising materials and the incidence of burglary. The record indicates otherwise. Lieutenant Stephen White of the Doylestown Police Department testified that, based on his experience, there was a correlation between the occurrence of burglaries and indications that residences were unoccupied. He testified that "[s]ome of the perpetrators [of the burglaries] said they looked at several signs that let them know that there is no one there, and one of the signs is advertising in the driveway of the home." [7] Lieutenant White stated that the number of burglaries in Doylestown had doubled from 32 in 1979 to 64 in 1980. He added that about one-third of the burglaries involved residences where

NOTE — *(Continued)*

town offered evidence at the February 19, 1981 hearing which is supportive of the unsightliness and privacy justifications. For example, there was testimony that advertising material was "being thrown over the roads and lawns." Transcript at 27. There also was testimony that requests to cease distribution were not honored. Transcript at 14, 27.

6. We are referred to Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). In the *Tinker* case, the record failed to establish that the school authorities had reason to anticipate that the wearing of armbands would substantially interfere with the work of the school or impinge upon the rights of other students. *Id.* at 508. Here, both the record and a common sense approach support the conclusion that the accumulation of advertising outside a place of residence is a signal to would-be burglars or vandals that the residence is unoccupied.

7. Transcript at 34.

the house was unoccupied or the citizen was on vacation.[8] The police officer further testified that in many instances of investigation of burglaries of unoccupied homes, he found indications that the residence was unoccupied, including the presence of advertising materials.[9]

In *Commonwealth v. Sterlace, supra*, the Supreme Court of Pennsylvania observed:

> There can be no question that an accumulation of advertising materials at the entry of a residence, whether at a door or a mailbox, poses significant risks in a residential area. Such an accumulation would be a clear invitation to burglars and vandals to enter apparently unoccupied premises.

481 Pa. at 12, 391 A.2d at 1069.

Time, place and manner regulations must also leave open adequate alternative means of communication. *Heffron v. International Society for Krishna Consciousness, Inc.*, 49 U.S.L.W. at 4766. The majority concludes that "[i]n the face of plaintiff's unrebutted evidence that alternatives to courier delivery are in terms of both time and money prohibitively expensive,[10] Doylestown has made no

8. *Id.*

9. Transcript at 35.

10. In this respect, the record is disturbingly deficient. The entire record contains only two references to the "cost" of alternative means of distribution. First, Smith, Ad World's president, testified on cross-examination that the U.S. Post Office is an alternative method of distribution "which is very, very expensive. For the small advertiser in our case it's something he can't afford to do." Transcript at 20. Second, Smith admitted on cross-examination that Ad World's manner of distribution is less expensive than distribution by knocking on the door. Transcript at 17, 18. What is apparent is that, other than the conclusory statement of Smith with respect to the use of the U.S. Post Office, there is no evidence that alternatives are prohibitively expensive.

such showing." Anomalously, the majority notes that Ad World has been using the U.S. mails to distribute its publication. Does not this fact, alone, belie plaintiff's "unrebutted evidence"? The use of the U.S. mails for distribution explicitly falls outside the purview of the ordinance.

The ordinance contains no restrictions on the use of public forums for distribution of *Piggy Back*. Nor does the ordinance contain an absolute prohibition on residential distribution; it affects only the *manner* of distribution on private property. Thus, even assuming, *arguendo*, that alternatives to courier delivery are prohibitively expensive, Ad World may continue courier delivery by altering its present manner of distribution. Significantly, Ad World's president admitted on cross-examination that the carrier could knock on the door and hand the publication to someone in the home.[11] The Pennsylvania Supreme Court in *Sterlace* construed an identical ordinance to permit door-to-door, face-to-face solicitation and distribution, as well as mail distribution and leafletting in public places. 481 Pa. at 13, 391 A.2d at 1070. Also, Ad World may continue its present manner of distribution if the request or consent of the occupant is obtained. *Commonwealth v. Sterlace, id.* The conclusion is inescapable that ample alternative avenues of distribution are available to plaintiff.

For the foregoing reasons, I vote to affirm.

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11. Transcript at 11.

UNITED STATES DISTRICT COURT,
E. D. PENNSYLVANIA.

AD WORLD, INC.

v.

TOWNSHIP OF DOYLESTOWN.

Civ. A. No. 81-0518.

March 25, 1981.

Sherman, Silverstein & Kohl, Cherry Hill, N. J., by Nan S. Famular, Cherry Hill, N. J., for plaintiff.

Harris & Harris, Warrington, Pa., for defendant; Blank, Rome, Comisky & McCauley, by Sheldon L. Albert, Philadelphia, Pa., of counsel.

MEMORANDUM OPINION AND ORDER

WEINER, *District Judge.*

This is an action challenging the constitutionality of an ordinance which makes it unlawful to distribute advertising material by certain means to residences without the consent of their owners or occupiers. At issue are the competing values behind the right of the people to freedom of speech, as guaranteed by the First Amendment to the United States Constitution, and the obligation of the state to protect the public's health, safety, and welfare through use of the police power. For the reasons to follow, we conclude that the challenged ordinance is constitutionally valid. The plaintiff's claims for damages and injunctive relief are therefore denied, and judgment is entered in favor of the defendant and against the plaintiff.

I.

Ad World, Inc. (Ad World) is the publisher of the "Piggy-Back", a sixteen page advertising bulletin which includes a few pages of consumer and community information. This publication is distributed weekly to 129,001 residences in central and lower Bucks County, Pennsylvania, including 3,000 in the Township of Doylestown. Ad World distributes each bulletin in a plastic bag, which is placed at the residence by a carrier who attaches it to a mail box hook or leaves it on a porch, sidewalk, lawn or some other location on the premises. All costs are paid by the bulletin's advertisers, and there is no charge to its recipients.

The Board of Supervisors of the Township of Doylestown (Doylestown) has enacted Ordinance No. 117, which provides as follows:

ORDINANCE NO. 117

AN ORDINANCE OF THE TOWNSHIP OF DOYLESTOWN, BUCKS COUNTY, PENNSYLVANIA, REGULATING THE DISTRIBUTION OF ADVERTISING MATERIALS AT RESIDENCES WITHIN THE TOWNSHIP.

WHEREAS, certain persons, firms or corporations have recently begun the distribution of advertising materials to Doylestown Township residents by placing or hanging the advertising materials on mail boxes or posts or by depositing the said material upon other portions of private property without the request or consent of the owners or occupiers of the property, and

WHEREAS, in the judgment of the Board of Supervisors this manner of distribution of advertising materials is unsightly, constitutes an invasion of privacy and unless picked up by the property owner

within a reasonable time, the presence of such advertising material would be a clear indication that the residence was unoccupied and thus increase the possibility of vandalism and/or burglary.

BE IT ORDAINED, by the Board of Supervisors of the Township of Doylestown, Bucks County, Pennsylvania and it is hereby Ordained and Enacted by authority of same:

1. That it shall be unlawful for any person, firm or corporation to distribute advertising material at a residence within Doylestown Township (other than at the home of the person, firm or corporation distributing the same) by placing such material at the residence, on the property or on the residential mail box of the person owning or occupying the residence, unless the person, firm or corporation distributing such advertising material does so based upon the affirmative request or consent of the person occupying the residence. The foregoing provision shall not apply to the distribution of advertising material through the United States mail service.

2. That any violation of this Ordinance shall be considered a summary offense and upon conviction before a district justice, the violator shall be subject to a fine not exceeding $300.00. Each unlawful distribution to a residence shall be considered as a separate offense.

3. That this ordinance shall be added to the Code of Ordinances of the Township of Doylestown, Bucks County, Pennsylvania, and shall be effective five (5) days after its legal enactment.

Plaintiff asserts that as a result of the enactment of the ordinance, it is prohibited from distributing its publication, and that if it continues to distribute its publica-

tion, it will be cited for violation of the ordinance, thereby creating a financial burden which it is unable to bear.

Ad World thus contends that the ordinance prescribes the distribution of a type of communication and as such violates its constitutional right to freely speak, print and disseminate its publication. Damages and injunctive relief are sought.

Defendant argues that the ordinance is necessary to protect residents from potential burglars and vandals, who would otherwise be alerted by the accumulation of advertising materials, such as plaintiff's publication, that a residence was apparently unoccupied. Defendant denies that the ordinance is unconstitutional as it does not proscribe speech, printing or dissemination, or the distribution of a type of communication, but rather merely regulates a method of delivery.[1]

II.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ," and is made applicable to the states via the Fourteenth Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 500, n.8, 72 S.Ct. 777, 780 n.8, 96 L.Ed. 1951 (1952). The First Amendment's protection encompasses commercial speech, that is, expression related solely to the economic interests of the speaker and its audience, but to a lesser degree than other constitutionally guaranteed expression. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Since the Doylestown ordinance specifically applies only to advertising materials, it is a

1. In addition, defendant argues that this court should decline to rule on this matter on the ground of abstention. We reject that contention as it is clearly erroneous.

restriction upon commercial speech.[2] Since plaintiff's publication is an advertising bulletin, it is a fortiori expression related solely to the economic interests of the speaker and its audience. We must therefore engage in the four-step analysis for commercial speech cases developed by the United States Supreme Court:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. 100 S.Ct. at 2351.

III.

A.

There is no question but that the plaintiff's advertising publication is protected by the First Amendment. Commercial speech is entitled to such protection, and there is absolutely no indication nor even any allegation that the publication does not concern lawful activity or that it is misleading. *See Id.*

B.

As justification for the ordinance, defendant asserts that it is necessary in order to prevent crime on residential

2. This singling out of a particular type of speech is not an impermissible subject matter or content restriction. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) and *id.* at 580, n.2, 100 S.Ct. at 2337, n.2 (Stevens, J., concurring in the judgment).

property. According to defendant the presence of advertising material, which has been left on, but not removed from a mailbox, step, porch, sidewalk or lawn, is a signal to would-be criminals that a residence is apparently unoccupied at the moment. This governmental interest in protecting the public from crime is of course substantial. *See, Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. 610, 616-19, 96 S.Ct. 1755, 1758-60, 48 L.Ed.2d 243 (1976); *Martin v. City of Struthers,* 319 U.S. 141, 144, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943).

C.

We consider next the relationship between the ordinance and the state's interests. We conclude that the accumulation of advertising materials at a residence poses significant risks to the public, as it is a clear invitation to burglars and vandals to enter apparently unoccupied premises. *See, Commonwealth v. Sterlace,* 481 Pa. 6, 12, 391 A.2d 1066, 1069 (1978).

We reject the plaintiff's argument that this link between the regulation and the state's interest is forged upon a mere unfounded possibility. The testimony of Doylestown Police Lieutenant White amply supports the connection between unoccupied residences and increased burglaries and vandalism.

By prohibiting the distribution of advertising material without consent, the ordinance will reduce the amount of printed material which can accumulate at a residence, thereby diminishing the risk of attracting criminals. It, therefore, directly advances the stated governmental interest.

D.

We address now the critical inquiry in this case: whether the ordinance is more extensive than is necessary

to serve the asserted governmental interest. We conclude that it is not.

The Doylestown ordinance is clearly circumscribed in scope and effect. It specifically applies only to advertising material, and prohibits only a certain manner of distribution made without the consent of the intended recipient. It does not affect any non-commercial expression, such as political speech, and does not prevent distribution of advertising materials by other means with the consent of the intended recipient. The requirement that the consent of owners or occupiers of township residences be secured before advertising materials can be left on their property does not unduly burden the free speech rights of those who would distribute such materials. Reasonable time, place or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication have long been recognized as valid. *Consolidated Edison Co., Inc. v. Public Service Commission of New York,* 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1978); *see, e.g. Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (parade license and fee requirement held constitutional).

The ordinance at issue is identical to the one held valid by the Pennsylvania Supreme Court in *Commonwealth v. Sterlace,* 481 Pa. 6, 391 A.2d 1066 (1978). The court there found the ordinance clearly distinguishable from those which ban all solicitation or distribution of handbills or printed materials for an insufficient reason, *see, e.g., Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), or eliminate a traditional forum of speech and leave limited alternatives of increased expense reaching a significantly decreased audience, *see, e.g., Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (prohibition of "for sale" signs on front lawn). 481 Pa. at 13, 391 A.2d at 1070.

Significantly, there is no limitation or infringement imposed upon the opportunity of plaintiff or other disseminators of protected commercial expression to *solicit* potential recipients of advertising materials in order to attempt to win their consent. *See, Martin v. City of Struthers,* 319 U.S. 141, 147, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943) (ban on door-to-door solicitation held invalid as applied to distribution of religious material); *but see, Breard v. City of Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951) (ban on door-to-door commercial solicitation held valid, but case decided before Court's recognition, *see, e.g., Central Hudson,* that First Amendment protection extends to commercial speech), and *Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. at 619, 96 S.Ct. at 1760 (door-to-door solicitation "not immune from regulation under the state's police power").

Plaintiff's reliance on *Van Nuys Publishing Co. v. City of Thousand Oaks,* 5 Cal.3d 817, 97 Cal.Rptr. 777, 489 P.2d 809 (1971) is of no avail. The ordinance in that case, held unconstitutional, was similar to the one promulgated by Doylestown in that it required consent before various printed matter could be distributed on the grounds of a house, but unlike the Doylestown ordinance, was not limited solely to a ban on distribution of advertising materials but applied as well to the distribution of political materials. Additionally, and also in contrast to the Doylestown ordinance, its asserted purpose was merely to reduce litter and protect unwilling listeners, goals equally served by a more narrowly drawn provision.

In the case *sub judice,* a more limited regulation simply would not be effective to achieve the governmental objective of preventing crime by regulating the accumulation of materials which create the appearance that a residence is unoccupied. For example, we can postulate a

regulation which would require owners or occupiers of residences to affirmatively object before distribution of advertising materials could be prohibited. However, residents who are not at home at the time of an attempted delivery of a publication, such as plaintiffs, would be unable to object to its receipt until some later time. Yet, during that interval before objection could be made, material would accumulate at the residence and thereby serve to signal its vulnerability and to invite criminal activity. In contrast, where an owner or occupier of a residence has expressed a desire to receive advertising materials, as required by the Doylestown ordinance, the risk of burglary or vandalism is greatly reduced, for the resident will know of the delivery and can collect the materials before they accumulate. *See, Commonwealth v. Sterlace*, 481 Pa. at 12, 391 A.2d at 1069. If a resident will be away from home, arrangements can be made for another to remove them before they accumulate, just as arrangements are commonly made for a neighbor to collect the mail of an absent fellow resident.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1497

AD WORLD, INC.,

Appellant

v.

TOWNSHIP OF DOYLESTOWN

(D. C. Civil No. 81-0518)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, and SLOVITER, *Circuit Judges* and MEANOR, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on November 19, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the jugment of the said District Court, entered March 26, 1981, be, and the same is hereby reversed and the cause remanded for the entry of an injunction against enforcement of Ordinance 117 and for

* Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

further proceedings with respect to Ad World's damage claim consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

/s/ SALLY MRVOS

Clerk

February 5, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1497

AD WORLD, INC.,

Appellant

v.

TOWNSHIP OF DOYLESTOWN

(D. C. Civil No. 81-0518)

ORDER

Present: GIBBONS, and SLOVITER, *Circuit Judges* and MEANOR, *District Judge.*

Having considered the motion for stay of mandate and the appellant's opposition thereto, it is

ORDERED that the motion be and the same is denied.

By the Court,

/s/ JOHN J. GIBBONS
Circuit Judge

Dated: February 26, 1982

Opposition

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-1765

IN THE

Supreme Court of the United States

October Term, 1981

TOWNSHIP OF DOYLESTOWN,

Petitioner

v.

AD WORLD, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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No. 81-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TOWNSHIP OF DOYLESTOWN,

Petitioner

v.

AD WORLD, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

Respondent is the publisher of *Piggy Back*, a weekly free circulation community newspaper. Newspapers of this type are delivered without charge to homes within the communities which they serve. Their publication is supported by revenues from classified and local commercial advertising. (Pet. A4).

Free community newspapers have a total circulation of more than 18 million copies in the United States each week. Approximately 80% of this circulation takes place

through hand delivery to individual residences. (Pet. 15). This is the method of distribution ordinarily employed by respondent, and the means it sought to employ in Doylestown Township. Respondent's newspaper is placed in a plastic container and delivered by a local route carrier—typically a teenager working after school—who attaches the container to a mail box hook, if one is available, or who otherwise hangs the container on a door knob or places it at some other location accessible to the carrier and the resident. (Pet. A4). Respondent's policy is to stop delivery of *Piggy Back* when a resident so requests (respondent's name, address, office hours and telephone number appear prominently on the mast head of the paper), and respondent further instructs its carriers not to make delivery if the prior week's paper has not been picked up. (Pet. A4; App. 30-31).[1]

Piggy Back is not, as the petition alleges, an "advertiser" incorporating only a "token" amount of noncommercial material and "occasional" announcements of community events. (Pet. ii, 7). It is a useful and informative general community newspaper, containing news and information about local cultural and recreational events, local educational programs, and local public and governmental meetings. This information, presented in the form of articles, notices and a detailed full-page community calendar, is not readily available in any other publication. *Piggy Back* also contains features, cartoons, illustrations and political, commercial and classified ad-

1. "Pet." citations are to the petition for certiorari; "App." citations are to the Joint Appendix in the Court of Appeals.

Requests to stop delivery are rare. Of 3000 households in Doylestown Township, respondent has received about 50 requests to stop delivery. (Pet. A8). Respondent's carriers are also instructed to retrieve prior issues that may not have been picked up by the resident. (App. 30-31).

vertisements by local candidates, merchants and residents. As the Court of Appeals found (Pet. A7-A8), "*Piggy Back* performs locally functions that larger metropolitan or regional newspapers undertake: spreading information generally, and providing a medium for advertising. Like such newspapers, it carries news and editorials as well as advertising, in a ratio which appears to be not significantly different from some established newspapers. *Piggy Back* appears to be accepted as a newspaper in the Doylestown community . . . ."[2]

Respondent has published *Piggy Back* in Bucks County, Pennsylvania, since 1963. Its weekly circulation has grown from 5000 to 150,000. *Piggy Back* is now distributed throughout lower Bucks County, in substantial parts of central Bucks County, and in some surrounding areas as well. So far as respondent is aware, Doylestown Township is the only one of the numerous boroughs and townships that *Piggy Back* has served in the last twenty years that has legislated against its distribution.

Respondent began distribution of *Piggy Back* to 3000 homes in Doylestown Township in October 1980. Ordinance 117 was enacted in direct response to respondent's decision to begin circulation in Doylestown. It is undisputed that the ordinance was specifically intended to outlaw *Piggy Back's* ordinary method of distribution by prohibiting respondent from distributing without an expressed affirmative request from each household. (App. 37). A criminal penalty of $300 was imposed for each distribution to a residence without such prior request. At

2. As additional confirmation that *Piggy Back's* noncommercial content is neither "token" nor "occasional", we have appended to this Brief a photocopy (reduced in size by one-half) of the first page of the February 4, 1981, issue for the Doylestown area. This issue was before the District Court and the Court of Appeals (App. 16-17) and is, in all respects, typical.

the trial below, respondent's president testified, without contradiction, that *Piggy Back* would be "forced to go out of business" in any area where Ordinance 117 or a similar law was in force. (App. 19).[3]

The present action challenging the constitutionality of Ordinance 117 was begun one week after its enactment. Respondent was concededly threatened with immediate prosecution. (Pet. A23; App. 7).[4]

Ordinance 117 recites three reasons for prohibiting house-to-house distributions of material without the prior expressed request of each household: that the distribution of such materials is "unsightly"; that unsolicited distribution constitutes "an invasion of privacy"; and that such dis-

3. The viability of a free community newspaper depends upon its circulation to a very large percentage of the households in the local area it serves. As the Court of Appeals found: "Publications like *Piggy Back* are able, through an almost universal distribution to communities in suburban and rural areas, to make rates per household reached so attractive that local businesses can afford to advertise." (Pet. A4). By requiring a prior request from each household, Ordinance 117 would make such distribution impossible. Although Ordinance 117 would permit broad distribution of *Piggy Back* through the mails, respondent's president testified (again without contradiction) that mail distribution for a publication like *Piggy Back* is "very, very expensive. For the small advertiser, in our case it's something he can't afford to do." (App. 30). The Court of Appeals accepted respondent's "unrebutted evidence that alternatives to courier delivery are in terms both of time and money prohibitively expensive." (Pet. A12).

4. At the commencement of the action, the District Court issued a temporary restraining order against enforcement of the ordinance against respondent. (App. 10). This order remained in effect until after the District Court's decision upholding the ordinance. After it reversed that decision, the Court of Appeals denied petitioner's motion for stay of mandate on February 26, 1982. On March 30, 1982, the District Court entered a permanent injunction prohibiting enforcement of Ordinance 117 against respondent.

tribution might "increase the possibility of vandalism and/or burglary." The Township, however, has abandoned reliance on all but the last of these objectives, counsel noting at trial "for the record," that "there is no question of enforcement of the ordinance as an anti-littering ordinance or to protect somebody's rights to privacy." (App. 39).

The District Court upheld the constitutionality of the ordinance as applied to respondent. It based this decision on its holding that *Piggy Back* is "commercial speech" and thus entitled to "a lesser degree of [First Amendment protection] than other constitutionally guaranteed expression." (Pet. A23-A24). The Court of Appeals reversed, holding that Ordinance 117 "violates Ad World's first and fourteenth amendment rights." (Pet. A3).

The Court of Appeals was unanimous in reversing the District Court's determination that *Piggy Back* was entitled to a "lesser degree" of constitutional protection. It held that, in view of *Piggy Back's* substantial and significant noncommercial content, it "must be considered noncommercial speech." (Pet. A7).[5] The Court of Appeals also accepted the facial legitimacy of the Township's alleged purpose to "prevent or to reduce burglary or vandalism." (Pet. A9). The court held, however, that "Ordinance 117 is not sufficiently related to the state interest advanced to pass constitutional muster." (Pet. A12). Judge Gibbons' opinion noted that the Township had produced "no evidence" of a strong connection between accumulation of papers and the incidence of burglary; any

5. The majority opinion also noted that "[t]here is no evidence that the editorial content is added as a mere sham to convert a pure advertising leaflet into noncommercial speech. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942)." (Pet. A8). Dissenting District Judge Meanor agreed that *Piggy Back* "is entitled to full first amendment protection." (Pet. A16).

increase in crime was wholly "hypothetical or speculative."[6] Moreover, the Township had seriously "undercut its burglary rationale" both by restricting its prohibition to the distribution of "advertising materials" (thus leaving exempt the delivery of other publications that "could lead to similar accumulation and the same attendant risks") and by failing to show that consented distribution (per-

6. The only direct evidence in this case of any connection between respondent's distributions and crime in Doylestown was the oral testimony of one police officer that burglaries had increased in Doylestown Township from a total of 32 residential burglaries in 1979 to 64 burglaries in 1980, the year when respondent began distribution in the Township. (App. 44). Significantly, only one-third of these crimes involved permanently or temporarily unoccupied houses (the only situation identified in Ordinance 117 as creating a danger). (App. 44). Even more significantly, although Ordinance 117 was concededly adopted in direct response to the commencement of distribution of *Piggy Back* in Doylestown, this testimony did not seek to separate the 1980 increase in burglaries as between burglaries occurring during the first nine months of 1980, when respondent had not yet begun distribution, and the period after October, 1980, when respondent had begun circulation, although such data were surely available to the Township. Nor was there any effort to show, as to any particular crime, that it had occurred at an unoccupied residence where respondent's newspaper (or a similar distribution) had been visible for a significant period of time. Indeed, when asked by the trial Judge, "Do you know why burglaries have increased," the Township's witness, in response, did not mention respondent's distributions, but answered, in full: "I would say there are several reasons. One is the high increase in the price of gold and silver and the people committing the burglaries are looking for different things." The Judge then remarked to respondent's counsel: "I don't think they are accusing your client of causing increased burglaries." (App. 48). Regarding the Township's 1980 increase in burglaries, the Court of Appeals thus concluded: "There is no evidence that the increase occurred in the period following distribution of *Piggy Back*, and no evidence on the *modus operandi* of the burglars." (Pet. A9 n.7).

mitted by the ordinance) "leads to less accumulation than unconsented distribution." (Pet. A10).

In addition, Ordinance 117 also failed to comply with the basic rule that regulations of free expression "must be precisely drawn." The court noted that, in *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court had invalidated a similar total ban on unsolicited residential distributions because of the failure to utilize less restrictive alternatives: "[T]he city could enforce its trespass laws against burglars or a homeowner could put up a 'no solicitation' sign which would be strictly enforced." Doylestown had not shown "why similar solutions would not suffice." Moreover, "other possibilities come to mind: forms may be attached to the papers that can be returned by a homeowner not wanting to receive *Piggy Back;* a municipal office may channel complaints against distributors; a requirement may be imposed that homeowners take steps to prevent accumulation in their absence." Nor did Doylestown's ordinance leave "adequate alternative methods of communication" in view of respondent's "unrebutted evidence that alternatives to courier delivery are in terms of both time and money prohibitively expensive." In sum, the Township was "completely silent on why some method of solving the paper accumulation problem less intrusive on the rights of the press than Ordinance 117 would not be equally effective." (Pet. A10-A12).[7] The cause was remanded for the entry of an injunction and consideration of damages. (Pet. A13). The court denied petitioner's motion for stay of mandate and the District Court has, in due course, entered an injunction. (See n.4, supra).

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7. As noted in the petition, District Judge Meanor's dissent was based primarily upon his reluctance to "lightly disregard" the decision of the Pennsylvania Supreme Court in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A.2d 1066 (1978). As we show below, however, the *Sterlace* decision is not in conflict with the decision of the Court of Appeals in this case.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals below is a clearly correct application of established First Amendment principles. It is not in conflict with the decision of any other federal court of appeals or of any state court of last resort. The petition for a writ of certiorari should therefore be denied.

1. The Decision Below Is Clearly Correct.

The petition does not argue that the decision of the Court of Appeals below is substantively incorrect. The decision below is, in fact, a clearly correct application of well established First Amendment principles.

Petitioner does not seek review of the holding below that respondent's newspaper, *Piggy Back*, is entitled to the full protection of the First and Fourteenth Amendments. This Court has established that "commercial speech" is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980). Thus the "commercial speech" doctrine applies only to "*purely* commercial advertising" (*Valentine v. Chrestensen*, 316 U.S. 52 (1942) —to speech that does "*no more* than propose a commercial transaction "(*Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) (emphases added). As the Court of Appeals unanimously determined, *Piggy Back* plainly does not fall into this category.

The traditional right to engage in house-to-house or door-to-door distribution of constitutionally protected materials has also been firmly established by this Court. See *Marsh v. Alabama*, 326 U.S. 501, 505 (1946): "[T]he preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature

as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature." See also *Schneider v. State*, 308 U.S. 147, 164 (1939); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

It is equally well established that the right of house to house distribution cannot be qualified—as Ordinance 117 would have it be—by a legal requirement that a distributor must in all cases obtain express prior permission from each resident to whom distribution is sought to be made. Rather, "the decision as to whether distributors of literature may lawfully call at a home" must be left "where it belongs—with the homeowner himself. A city can punish those who call at a house in defiance of the previously expressed will of the occupant . . . ." *Martin v. City of Struthers*, supra, 319 U.S. at 148. See also *Rowan v. Post Office Department*, 397 U.S. 728, 737 (1970): "The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers, from his property." The statute involved in *Rowan* did not violate this principle because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."

The Court of Appeals recognized that the traditional right of unsolicited house-to-house circulation is, like other First Amendment rights, neither absolute nor unlimited. It correctly held, however, that a heavy burden rests upon a municipality seeking to legislate against the exercise of this right. The privilege may not be withdrawn merely because it may "create a minor nuisance for a community." Rather the "peace, good order and comfort of the community" must "imperatively require" regulation. *Martin*

v. Struthers, supra, 319 U.S. at 143. A prohibition "must have clear support in public danger, actual or impending." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); see also *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 95-96. A municipality must establish, moreover, "that its interests could not be met by means that would be less intrusive on activity protected by the First Amendment." *Schad v. Borough of Mount Ephraim*, 101 S.Ct. 2176, 2183 (1981). See also *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Grayned v. City of Rockford*, 408 U.S. 116-117 (1972).

The Court of Appeals below correctly held—and petitioner does not argue otherwise—that Doylestown Township failed to meet these burdens. Doylestown not only provided "no evidence of a strong connection between accumulation of papers and the incidence of burglary" (Pet. A10), it was also "completely silent on why some method of solving the paper accumulation problem less intrusive on the rights of the press than Ordinance 117 would not be equally effective." (Pet. A12).

2. No Conflict Exists Between the Decision Below and the Decision of the Supreme Court of Pennsylvania in *Commonwealth v. Sterlace*.

The principal ground asserted in the petition for invoking this Court's discretionary jurisdiction is a supposed "irreconcilable conflict" between the decision of the Court of Appeals below and the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A.2d 1066 (1978). No such conflict exists.

The Court of Appeals in the present case held Ordinance 117 unconstitutional only as specifically applied to respondent's community newspaper.[8] As a predicate to

8. The petition erroneously asserts that the Court of Appeals addressed Ordinance 117 "on its face." (Pet. 12). The Court of

this holding, the court, as described above, first determined that respondent's newspaper, *Piggy Back*, was "noncommercial speech" "entitled to the full protection of the first and fourteenth amendments." (Pet. A7, A9). *Commonwealth v. Sterlace*, upon which petitioner relies, did not similarly involve the distribution of material entitled to full first amendment protection. Rather, *Sterlace* was a prosecution for the unsolicited distribution of "sample products, coupons, and other advertising materials, all contained in six by twelve-inch plastic bags." 354 A.2d 27, 28 (Pa. Commw. Ct. 1976). Sterlace, the defendant, operated a "distribution service" and had contracted with "various retail merchants . . . . to deliver [such materials]." The ordinance in *Sterlace*, moreover, was enacted specifically to regulate Sterlace's particular sample product distribution service. (*Ibid.*)

At most, the material in *Sterlace* was entitled, not to full First Amendment protection, but to the lesser degree of protection afforded to purely commercial advertisements. The decisions in *Sterlace* and the present case are therefore not in any respect in conflict with each other. Indeed, in expressly striking down Ordinance 117 only as specifically applied to a newspaper held entitled to full first amendment protection, the Court of Appeals decision below made clear that it did purport to prohibit enforcement of such Ordinance against the distribution of purely commercial materials or advertisements. Thus, respondent argued in the Court of Appeals, first, that *Piggy Back* was fully protected speech and, alternatively, that it would be protected here "even if it were commercial speech". The court held that "[s][illegible] the first contention is well

8. (Cont'd.)

Appeals expressly noted, however, that "[w]e do not reach" claims of facial unconstitutionality since "we find Ordinance 117 to be unconstitutional *as applied*." (Emphasis added.)

taken, we need not reach the second." (Pet. A7). Contrariwise, the Pennsylvania Supreme Court's *Sterlace* decision was just as plainly not intended to constitute a holding that an ordinance like Ordinance 117 can constitutionally be employed against fully protected speech. Justice Roberts' opinion for the court there took special pains to point out his clear understanding that, "while commercial speech is protected by the first and fourteenth amendments to the Constitution, the protection afforded is 'a limited measure of protection, commensurate with [commercial speech's] position in the scale of First Amendment's values, [thus *allowing*] *modes of regulation that might be impermissible in the realm of non-commercial expression.*'" (Emphasis added.) The court explicitly observed that the conflicting interests present in commercial speech situations call for "a more flexible [constitutional] standard" than that applicable to ordinary speech. 391 A.2d at 1070.

3. There Is No Relevant Division of Authority in the State or Lower Federal Courts.

Petitioner suggests (Pet. 19-20) that there is a "division of authority" in the state and lower federal courts over the constitutionality of ordinances forbidding distributing without prior permission. However, as was true with *Commonwealth v. Sterlace*, supra, all of the federal and state supreme court cases that petitioner invokes as upholding such ordinances (except for one state case decided more than forty years ago)[9] involved their applica-

9. *People v. Bohnke*, 287 N.Y. 154, 38 N.E.2d 478 (1941). (Pet. 20). The per curiam opinion in *Bohnke* upheld a conviction of ordained ministers for circulating religious pamphlets from door to door without the prior consent of the occupant. The *Bohnke* decision is plainly inconsistent with this Court's decision, two years later, in *Martin v. Struthers*, supra. *People v. Walkenhorst*, 55

tion to the unsolicited distribution of *purely commercial* materials. Each of these cases was decided prior to this Court's 1975 holding that commercial advertising enjoys a significant degree of first amendment protection,[10] and in all but one of them (a 1939 federal district court opinion) decision was specifically grounded on the court's expressed assumption that the commercial advertising involved enjoyed no First Amendment protection whatsoever. These holdings would currently be inapposite even if *Piggy Back* were commercial speech; they are entirely irrelevant as applied to fully protected speech.

Thus, *Ad Express, Inc. v. Kirvin*, 516 F.2d 195 (2d Cir. 1975) (Pet. 20), involved a distribution of "printed advertising materials and samples." The court's opinion was explicitly grounded on the assumption that "the Constitution imposes no restraint on government with respect to purely commercial advertising." 516 F.2d at 197. *National Delivery Systems v. City of Inglewood*, 43 Cal. App. 3d 573, 117 Cal. Rptr. 291 (1974) (Pet. 20), was decided on the ground that what was involved there was a

9. (Cont'd.)
Misc. 2d 935 (1968), also relied upon by petitioner (Pet. 20) was a lower court decision that relied entirely on *Bohnke* and was, in all events, reversed on appeal because the prosecution had failed to establish a violation of the ordinance. 59 Misc. 2d 563 (App. Div. 2d Dept. 1969). The only other case invoked by petitioners is *DiLorenzo v. Pacific Grove*, 260 Cal. App. 2d 68, 67 Cal. Rptr. 3 (1st Dist. 1963), which was expressly overruled by the Supreme Court of California in *Van Nuys Pub. Co. v. City of Thousand Oaks*, infra, 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809 (1971), cert. denied, 405 U.S. 1042 (1972). As petitioner notes, the decision of the California Supreme Court in *Van Nuys* is completely consistent with the decision of the Court of Appeals in the present case.

10. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975).

"purely commercial distribution" and that "the First Amendment is not intended to protect the distribution of purely commercial matter." 43 Cal. App. 2d at 577. Similarly, *Sunday Mail, Inc. v. Christie*, 312 F.2d 677 (C.D. Cal. 1970), was decided entirely through reliance on this Court's decision in *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). The latter opinion, in turn, was decided at a time when commercial advertisements were unprotected and rested primarily on the fact that "[t]he selling . . . brings into the transaction a commercial feature." [11] Finally, *Buxbom v. City of Riverside*, 29 F. Supp. 3 (S.D. Calif. 1939), involved a prosecution for the distribution of an "advertising sheet." 29 F. Supp. at 8.

Where fully protected materials have been involved, both state and lower federal courts have been in complete accord in recent years in striking down the application of ordinances requiring the prior expressed permission of residents as a condition of making house to house distributions or solicitations. In addition to the decision below, see *Van Nuys Publishing Co. v. City of Thousand Oaks*, 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809 (1971), cert. denied, 405 U.S. 1042 (1972); *Troyer v. Town of Babylon*, 483 F. Supp. 1135 (E.D.N.Y. 1980); *Toms River Publ. Co. v. Borough of Manasquan*, 127 N.J. Super. 176, 316 A.2d 719 (1974); *New York Public Interest Research Group, Inc. v. Village of Rosyln Estates*, 489 F. Supp. 922 (E.D.N.Y. 1979). See also *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979) (commercial speech).

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11. *Breard's* "simplistic approach" was rejected by this Court in *Virginia Pharmacy*, supra, 425 U.S. at 759.

4. Communities Do Not Commonly Seek to Control Residential Burglary by Prohibiting Unsolicited Distributions of Printed Material; On the Contrary Doylestown's Ordinance Is Virtually Unique.

Finally, petitioner urges the Court to grant certiorari because "ordinances of the type invalidated by the Court of Appeals in this case have become one of the only remaining means of dealing with the mounting problem of local crime aggravated by the distribution practices of [the community newspaper] industry." (Pet. 19). Petitioner asserts that ordinances "like" that involved here are "quite common." (Pet. 17). It cites 34 ordinances of Pennsylvania townships and boroughs (out of 100 localities surveyed) that allegedly fall in this category. (Pet. 17 n. 3).

Respondent has carefully examined the 34 Pennsylvania ordinances cited by petitioner as constituting examples of legislation relevantly "like" Ordinance 117. This examination shows that *not one* of these ordinances is addressed to the problem of controlling burglary or vandalism. Thirteen of the ordinances are explicitly addressed solely to the problem of litter. Eight of these (all of which are identically worded) contain an express statement of legislative intent reciting "that litter carelessly deposited in the borough is the cause of civic disgrace;" [12] no other legislative purpose is mentioned. In addition, the identical prohibition sections of all of these ordinances explicitly exempt newspapers (defined to include *Piggy Back*) that are "placed on private property in such a manner as to prevent their being carried or deposited by the elements upon any street or other public place or upon

12. Ashley Code, § 69-1; Homestead Code, § 63-1; Mahoney City Code, § 128-1; Marion Heights Code, § 35-1; Milford Code, § 69-1; Millbourne Code, § 50-1; Montrose Code, § 70-1; West Hazelton Code, § 73-1.

private property." [13] Five other ordinances are specifically denominated "litter" ordinances and are also inapplicable to respondent's distributions.[14] The remaining twenty-one ordinances make clear by their terms that littering was the only evil sought to be addressed. These ordinances would, in addition, be inapplicable to respondent's newspaper, since they are addressed only to commercial "handbills" and the like, or contain expressed exceptions for distributions made in a manner not likely to cause litter.[15]

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13. Ashley Code, § 69-13B; Homestead Code, § 63-13B; Mahanoy City Code, § 128-13B; Marion Heights Code, § 35-13B; Milford Code, § 69-17B; Millbourne Code, § 50-18B; Montrose Code, § 70-18B; West Hazelton Code, § 73-18B. *Piggy Back* is delivered in a plastic container. (Pet. A4). Its distribution is therefore expressly exempted from all of these ordinances.

14. Carbondale Code, § 42-11; Edwardsville Code, § 82-2; Harveys Lake Code, § 25-2; Radnor Code, § 83-2G; Steelton Code, § 71-2G. Thus, the Carbondale ordinance exempts distribution of "daily newspapers, *newspapers of free circulation*, and addressed envelopes." (Emphasis added.) The Edwardsville and Harveys Lake Codes apply only to the deposit of "litter." The Radnor and Steelton Codes apply only to the distribution of "commercial or noncommercial handbill[s]."

15. Thus the Columbia Code, § 46-1 prohibits only "the casting or scattering [of "handbills or advertising matter"] upon any of the streets, sidewalks, alleys or public places in the borough." The Coal Code, § 89-3 provides that "[n]o handbill or sample or other article for advertising purposes shall be cast, thrown or scattered . . . ." The Clearfield Code, § 31-1 applies only to "handbills, posters, flyers or any samples of patent medicine or any kind of groceries or merchandise." Jenkintown Code, § 103-1 exempts material "delivered in such a manner that the same shall not be blown onto the lawns or highways of the borough." The Fountain Hill Code, § 35-1 exempts material "properly enclosed in envelopes." The Prospect Park Code, § 90-1 and the Eddystone Code, § 71-1 exempt material "contained in any [addressed] envelope." The other ordinances apply to the "throwing", "dropping" or "plac-

In sum, ordinances like Doylestown's are, at best, exceedingly rare. The decision of the Court of Appeals below does not in the least interfere with any common or accepted technique of local crime control.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Philadelphia, PA 19104
(215) 243-7417
Counsel for Respondent

April, 1982

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15. (Cont'd.)
ing" of material such as "posters, circulars, bills, handbills, or other advertising matter, or wastepaper of any kind of description." Norwood Code, § 61-8. See also Abington Code, § 108-1E; Coatsville Code, § 84-2; Curwensville Code, § 65-2; Darby Code, § 82-1; Forty Fort Code, § 32-2; Littlestown Code, § 3-1; Palmer Code, § 34-3F; Sharon Hill Code, § 86-4; Springdale Code, § 34-1; Stroudsburg Code, § 46-1H; Swoyersville Code, § 32-1. Interestingly, two of the ordinances cited by petitioner explicitly adopt the principal less restrictive alternative suggested by the Court of Appeals below. They prohibit distribution "if there is placed on the premises in a conspicuous position near the entrance a sign bearing the words 'No Trespassing,' 'No Peddlers or Agents,' 'No Advertising' or any similar notice indicating in any manner that the occupants of said premises do not desire to be molested or have their right of privacy disturbed or to have any such handbills left upon such premises." Pennsburg Code, § 57-3; West Chester Code, § 64-3.

Appendix

Piggy-Back

Community Calendar

1345 E. LINCOLN HWY., (Rt. 1), LEVITTOWN, PA. 19058 • (215) 675-6967 • 794-8826 • DAILY 9 A.M. - 5 P.M. • THURS. til 8 P.M.

Vol. 17 No. 31 WEDNESDAY, FEBRUARY 4, 1981 Published by Ad World, Inc.

Fred M. Hechinger, President of the New York Times Company Foundation, will be the featured speaker at the Central Bucks Chamber of Commerce 34th Annual Meeting.

FOUNDATION PRESIDENT AT CHAMBER ANNUAL

Wednesday, February 11, 11:45 a.m.
Highpoint Racquet Club, Chalfont
Info. and Reservations: 345-7051

"Building Confidence in Public Education" will be the topic of Foundation President Hechinger's talk on Wednesday, February 11.

Mr. Hechinger began writing for the Times of London while he was a graduate student, and for ten years was Education Editor of the New York Times. In 1977 he became President of the New York Times Foundation following posts as editorial board member and editorial page assistant editor of the Times.

In addition to his teaching positions at City University of New York and the New School for Social Research, he was appointed to the President's Commission on foreign language and international studies (1978-79) and is a Carnegie Fellow as well as special advisor, Aspen Institute.

Mr. Hechinger holds the British Empire Medal and has received several Education Writers Association awards; the Fairbanks Award; the Townsend Harris Medal; twice for the Society of the Silurians Editorial Writing Award, and a City College Distinguished Alumni Medal in 1973. He is also past president of the Education Writers Association and the City College Chapter of Phi Beta Kappa.

The author of many educational articles and books, Mr. Hechinger has also received 12 honorary doctorates from U.S. colleges.

The Central Bucks Chamber's 34th annual meeting is open to the full membership and the public.

The cost of $10 per person includes luncheon, and reservations may be made by calling 345-7051.

WARMINSTER GENERAL INVITES "HEART TO HEART" PARTICIPATION

225 Newtown Road, Warminster
Every Monday through Friday, 1:00 to 2:00 p.m.
Free and Open to the Public — Info.: 441-6719

Making life easier for heart attack victims are Warminster General Hospital's (WGH) "Heart to Heart" classes, an out-patient program and a most important part of cardiac rehabilitation.

Designed for Warminster General patients and any other community member who has sustained a heart attack, the purpose of the free, comprehensive program according to Beverly Samson, L.P.T., Supervisor of Physical Medicine and Rehabilitation, is "to take away the element of fear" so often felt by patients concerned with resuming daily activities.

Persons in "Heart to Heart" classes learn how to eliminate or control risk factors leading to further heart problems, and stress management as well as being able to tell the symptoms and signs of heart attacks are also covered.

Teaching people to adjust to an altered lifestyle is not so difficult when people learn they can still enjoy treats like Christmas cookies by altering a recipe and save precious personal energy through simple adjustments at home. Maintaining an active sex life with guidelines offered by the professional team at WGH, especially trained in cardiac care, is also discussed.

In addition, the everyday communication with the staff and interaction with other heart attack victims all contribute to a patient's 'feeling of competence' in managing himself on a daily basis.

Family members are encouraged to participate and observe during much of the program since they are considered so important in the recuperation of a heart patient.

They are also urged to enroll in a four-hour cardio-pulmonary resuscitation (CPR) course offered on a regular basis at the hospital.

"Heart to Heart" classes complement the extensive in- patient Cardiac Rehabilitation Program at WGH.

Warminster General Hospital is located at 225 Newtown Road in Warminster.

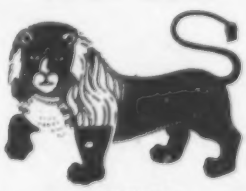
"Heart to Heart" classes are held Monday through Friday throughout the year from 1:00 to 2:00 p.m. in the third floor lounge of the Progressive Care Unit.

Further information may be obtained by calling the Education Department at the hospital at 441-6719.

Regaining a 'feeling of competence' in daily living and learning the why's and wherefore's of heart disease, is part of the purpose behind WGH's "Heart to Heart" classes.

"NEW HOPE COLLECTIONS"

Art Exhibit Through
Friday, February 27
Rodman House, Doylestown
1:00 to 4:00 p.m. Sunday through Friday
Free and Open to the Public



BCCA Logo

"New Hope Collections," an exhibition of art works owned by the New Hope Historical Society, Continental Bank at New Hope and private collectors from the area, will remain at the Rodman House, Route 611 and Almshouse Road through Friday, February 27.

According to Anita Subers, Executive Director, Bucks County Council on the Arts, (BCCA) many of the pieces have not previously been shown to the public.

Among the many artists represented in the exhibit are: Maxo Vanka, whose widow, Margaret, suggested the idea for the show; Charles Rosen; Morgan Colt; Jessie Drew-Bear; John Sharp; R.C. Magill; Harry Rosin; Edward Redfield, and Letitia Ely among many others.

Group appointments may be made for special showings.

For further information call 343-2800, extension 351.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1765

IN THE

Supreme Court of the United States

October Term, 1981

TOWNSHIP OF DOYLESTOWN,

Petitioner

v.

AD WORLD, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT

In its brief in opposition to the petition, respondent Ad World, Inc. ("Ad World") attempts, unsuccessfully, to distinguish the holding of the Court of Appeals below from the diametrically opposite result reached by the Supreme Court of Pennsylvania in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978), in which a Pennsylvania ordinance identical to that held unconstitutional below was upheld. Respondent also suggests that the

directly conflicting holdings of the Supreme Courts of Pennsylvania, Tennessee and California can somehow be harmonized and that Doylestown Township Ordinance No. 117 is "virtually unique" because other ordinances that apply to the problem do not specifically recite the prevention of residential burglaries as their objective.

None of these alleged reasons detracts from the importance to local communities of their right to adopt measures to protect residents from the demonstrated hazard of criminal activity invited by the accumulation of advertising materials deposited, without the consent of the occupant, on residential properties. The divided court below has effectively cancelled that important right. It has done so by erecting abstract standards of proof of justification that no ordinance dealing with this serious problem could possibly satisfy. That decision, as even the Court of Appeals recognized, is plainly at odds with the Pennsylvania Supreme Court's decision in *Sterlace*.

Finally, Ad World suggests that the Township does not contend that the decision is incorrect. (R. Br. at 8). Suffice it to say, if the Township did not think so, the Township would not be here. As the Petition states, the Third Circuit's decision in this case is based upon an unwarranted extension of this Court's decision in *Martin v. City of Struthers*, 319 U. S. 141 (1943). It misapplies precedents dealing with door-to-door distribution by handing literature to the occupant to the entirely distinct problem and hazard of depositing unsolicited advertising material on the doorstep. It upsets the balance between the First Amendment freedom to disseminate material door-to-door and the homeowner's right to physical safety. In the defense of the commercial interests of an aggressive and intrusive nationwide business, the decision below deprives citizens of their right to protect their homes and

property from burglars whose *modus operandi* is based on overreaching and dangerous conduct of the industry of which Ad World is a member.

The petition for certiorari should be granted, and the decision of the Third Circuit should be reversed.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. The Decision of the Third Circuit Conflicts With the Decision of the Pennsylvania Supreme Court in *Sterlace*.

Ad World seeks to minimize the conflict between the Third Circuit decision below and the Pennsylvania Supreme Court's decision in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978), by attempting to distinguish the decision below and the *Sterlace* decision. But the ordinance upheld in *Sterlace* was identical to the ordinance invalidated in this case. Indeed, as the Court of Appeals majority expressly noted in its opinion (Pet. A3 n. 1):

> "The ordinance apparently was patterned upon an ordinance in another community which in *Commonwealth v. Sterlace*, 481 Pa. 6, 391 A. 2d 1066 (1978) was held to be valid."

Ad World made the same unsuccessful attempt below to distinguish the decisions. It was not accepted below. The majority below apparently found no persuasive distinction between *Sterlace* and the case at bar, as evidenced by the fact that it did not even attempt to distinguish the *Sterlace* decision. The majority simply stated (Pet. A3 n. 1):

> "That opinion obviously cannot bind us in our interpretation of the Federal Constitution."

Nor was the dissenting judge able to perceive any distinction. On the contrary, Judge Meanor highlighted the obvious conflict (Pet. A13):

> "Less than four years ago, the Supreme Court of Pennsylvania had occasion to determine the constitutionality of an ordinance identical to Doylestown Ordinance No. 117. The ordinance was upheld as constitutional. *Commonwealth v. Sterlace,* 481 Pa. 6, 391 A. 2d 1006 (1978). The majority of this court makes only casual reference to the *Sterlace* decision, without explication. I cannot so lightly disregard a decision of Pennsylvania's highest tribunal. Fundamental tenets of federalism and comity demand much more."

Neither did the district judge, who stated (Pet. A26):

> The ordinance at issue is identical to the one held valid by the Pennsylvania Supreme Court in *Commonwealth v. Sterlace,* 481 Pa. 6, 391 A. 2d 1066 (1978).

The majority's decision below and the decision in *Sterlace* cannot be harmonized. Ad World, however, now asserts that "[t]he decisions in *Sterlace* and the present case are . . . not in any respect in conflict with each other." Ad World rests on an alleged difference in the nature of the "advertising material" distributed by Sterlace and by it.

This hypertechnical distinction is of no significance. In *Sterlace,* the Supreme Court of Pennsylvania addressed the constitutionality of the identical McCandless Township ordinance on the basis of its construction of the ordinance *as applying both to commercial advertising and to non-commercial advertising*:

> The Commonwealth Court correctly concluded that this ordinance "applies to all advertising, both commercial and non-commercial."
>
> *Commonwealth v. Sterlace, supra,* 481 Pa. at 11, 391 A. 2d at 1069.

As the Pennsylvania Supreme Court noted in this connection:

> "Not all advertising proposes a commercial transaction. For example, public service organizations often advertise without proposing commercial transactions."
>
> 481 Pa. at 11 n. 3, 391 A. 2d at 1069 n. 3.

The *Sterlace* decision did not turn on the commercial or non-commercial nature of the "advertising material" involved.[1] The Pennsylvania Supreme Court upheld the constitutionality of the ordinance on broader grounds, finding it to be "a constitutional regulation of the time, place and manner of speech." 481 Pa. at 13, 391 A. 2d at 1070. Thus, the *Sterlace* decision cannot be harmonized with the decision of the Third Circuit below. The ground of the majority's decision below is similarly based on broader grounds.[2]

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1. It is true that the Pennsylvania Supreme Court majority, in response to a dissenting opinion in that case, did address the commercial aspects of the "advertising material" involved in the case. However, all the majority said was that applying a "least restrictive alternative analysis" would be incorrect "even if it were to be read as a regulation of commercial speech." This brief discussion played no role in the principal ground the decision.

2. Ad World suggests that the majority's decision below turns solely on the alleged "non-commercial" nature of the "advertising material," and takes issue with petitioner's characterization of the scope of the constitutional holding below, asserting that the majority below did not hold the ordinance facially unconstitutional, but only unconstitutional "as applied." (R. Br. at 10 n. 8). The rationale of the majority's decision sweeps wider than Ad World acknowledges. The heart of the ruling below lies in the majority's conclusion that this ordinance was simply a product of the "undifferentiated fears" of the citizens of this Pennsylvania township, and that the Township had shown no connection between residential

Ad World's effort to distinguish *Sterlace*, apparently rejected below, does not succeed here either.

II. The State Decisions Are in Conflict.

Ad World attempts to minimize the existing conflict among the California, Pennsylvania and Tennessee Supreme Courts, but its effort again rests on the erroneous assumption that the classification of the advertising material as "commercial" or "non-commercial" is dispositive in this context. It is not. Measured by the standard defined in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U. S. 557 (1980), an ordinance applied to "commercial" speech, to be valid, (1) must be based upon a "substantial interest," (2) must "directly advance the state interest involved," and (3) must be no more restrictive of expression than is necessary to serve the governmental interest. 447 U. S. at 564. Although the majority below concluded that Ad World's *Piggy Back* was not "commercial," and was entitled, therefore, to "full protection" under the First Amendment, the majority invalidated Ordinance 117 because it did not satisfy the second and third criteria of the standard in any event applicable were the material "commercial."

---

2. (Cont'd.)

burglaries and the visible accumulation of materials deposited without homeowners' consent on residential doorsteps, garage doors, lawns and elsewhere. The majority's conclusion on this point had nothing to do with subtle distinctions between the "commercial" and the "non-commercial" and the "sham non-commercial." Because of the broad ground on which the majority relied, its decision leaves little doubt of the result if the items disseminated were, in its judgment, more "commercial" than the Ad World publication in this case. Moreover, there is no intimation in the majority opinion that it would uphold the ordinance in its application to purely "commercial" speech. In practical effect, if not in express terms, the majority held the ordinance unconstitutional on its face.

Regardless of the classification of the advertising, the factors deemed dispositive were the same. The majority found the governmental interest in preventing crime "legitimate" (Pet. A9). However, it concluded that "Ordinance 117 is not sufficiently related to the state interest to pass constitutional muster" (Pet. A12), and held that the Township had not been able to show, to the majority's satisfaction, that there were no less restrictive alternatives for reaching the same goal. (Pet. A11). In this context the standard applied for "non-commercial" speech was no different from the standard that would have been applied had the majority concluded that the advertising material was "commercial." Thus, Ad World's attempt to minimize the sharp conflict among the state Supreme Courts rests on a distinction of no significance.

III. The Questions Presented Are Important.

Ad World attempts to minimize the significance of the important rights at stake by characterizing Doylestown's Ordinance as "virtually unique" and ordinances of this type "exceedingly rare." Ad World's only response to the many ordinances similar to Ordinance 117 is the suggestion that these ordinances would not apply to *Piggy Back*, or that the preambles to such ordinances [3] do not explicitly recite the hazards of inviting criminal activity as the justification for their proscription of this type of

3. Ad World's labelling of local ordinances as "anti-litter" measures is not dispositive of their purpose to eliminate the dangers of criminal activity invited by unconsented deposit in the homeowner's absence. Therefore, that thirteen similar Pennsylvania ordinances are explicitly addressed to the problem of "litter" is no limitation on their application to correct the evil of littering in a manner that invites criminal activity. Ad World's observation that some twenty-one other Pennsylvania ordinances are addressed

littering. Neither of these observations detracts from the importance of what is a widespread problem that has increasingly bedevilled local communities.

Decisions erroneously invalidating ordinances that address this mounting problem frustrate a legitimate power of local governments to adopt common sense measures to protect the safety of their citizens. The division of the lower courts on this issue makes it necessary and important for the Court to grant review and to reaffirm that local power in this context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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3. (Cont'd)

solely to the problem of "littering" is not only unsupported surmise, but is similarly wide of the mark. The fact remains that ordinances that serve the same purpose are common and that their utility has been thrown into serious question by the decision in this case.